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Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services

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TAKE COURAGE: WHAT THE COURTS CAN DO TO IMPROVE THE DELIVERY OF CRIMINAL DEFENSE SERVICES

*Adele Bernhard**

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I. INTRODUCTION

While federal and state legislatures have largely ignored wide-spread and acute deficiencies in the programs that ensure representation for the vast majority of individuals accused of crime,¹ an unprecedented number of actually innocent—wrongly convicted—men have been freed from prison or death row.² Recent investigations into the causes of these wrongful convictions reveal that bad lawyering significantly contributed to many of the adjudicatory disasters.³ I believe these multiple and damning revelations⁴ will encourage bar associations and law reform organizations to challenge inadequate criminal defense delivery systems in the courts and motivate courts to hear and decide the claims. My certainty is bolstered by a coherent and compelling philosophy of judicial policy making hypothesized by Malcolm M. Feeley and Edward L. Rubin from their study of the role the courts played in

1. DAVID COLE, NO EQUAL JUSTICE 92 (1999) ("Providing genuinely adequate counsel for poor defendants would require a substantial infusion of money and indigent defense is the last thing the populace will voluntarily direct its tax dollars to fund. Achieving solutions to this problem through the political process is a pipe dream."); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give A Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993) (explaining in a fun and forceful essay why the legislature will never adequately fund criminal defense since most people arrested and charged with crimes are members of a small sliver of society—young minority males—whose rights everyone else feels fairly sanguine about ignoring). Lack of legislative support for defense services is discussed *infra* at notes 96 through 98 and accompanying text.

2. JIM DWYER, PETER NEUFELD AND BARRY SCHECK., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (containing case studies of wrongful convictions, explaining which factors in the criminal justice system contributed to their occurrence, and proposing changes).

3. James S. Leibman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases 1973-1995*, Executive Summary, at ii (finding that incompetence of defense lawyers is a major cause of reversal of convictions in state capital cases). See also Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts*, CHI. TRIB., Nov. 15, 1999, § 1, at 1 (reporting that of the twelve men originally sentenced to death "in Illinois who have been exonerated since 1987, four were represented at trial by an attorney who has been disbarred or suspended").

4. To those of us who work as public defenders, or assigned counsel, or who are involved in efforts to support and improve the provision of defense services, these revelations are not a surprise. Some of the most persuasive commentary on the inadequacies of defense services was written over twenty-five years ago by David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973) and *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811 (1976). A great deal more has been written since then. For some of the most damning critiques see RICHARD KLEIN & ROBERT SPANGENBERG, *THE INDIGENT DEFENSE CRISIS* (1993); Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986); Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783; Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

reforming the prison system during the 1960's.⁵ To understand the power of their thesis, it is necessary to look at *Talley v. Stephens*⁶—one of the ground-breaking prison reform cases upon which their philosophy rests.

In 1965, the Arkansas State Penitentiary was administered in the style of a southern plantation. Crops were grown for profit and prisoners worked in the fields, watched over by other prisoners—not by professional guards.⁷ Whipping was inflicted for an inmate's failure to work hard enough.⁸ It was imposed summarily. The extent and severity of the punishment was determined at the whim of the prison employee holding the whip.⁹

In 1965, no case law existed that interpreted the Eighth Amendment to ban corporeal prison punishment.¹⁰ Nonetheless, that year Judge J. Smith Henley, of the United States District Court for the Eastern District of Arkansas, although unwilling to read a broad prohibition against corporeal punishment into the language of the Constitution, found a way to enjoin whipping in the penitentiary: he determined that whipping could not be inflicted without procedural safeguards.¹¹

Until then, courts refused to intervene in the operation of prisons. When asked to consider the appropriateness or constitutionality of prison conditions or discipline, courts focused on the needs of prison officials and the general public and were sympathetic, in the main, to the difficulties of running a safe and orderly correctional institution.¹² Judge Henley looked at the prisons from a different point of view. He saw the inmates and their plight at the hands of the prison authorities. He understood the interests of the administrators, but, at the same time, he did not let those considerations eclipse judicial concern for the inmates.¹³

5. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

6. 247 F. Supp. 683 (E.D. Ark. 1965).

7. FEELEY & RUBIN, *supra* note 5, at 52-53.

8. *Id.* at 54.

9. *Talley*, 247 F. Supp. at 687-88.

10. In fact until the 1960's, an unspoken but powerful "hands-off" doctrine prevented judges from intervening in the administration of prisons and from applying constitutional protections to prisoners. *See* MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* § 1.02 (2d ed. 1993).

11. *Talley*, 247 F. Supp. at 689.

12. MUSHLIN, *supra* note 10, at 7-8.

13. *Talley*, 247 F. Supp. at 686 (stating that

On the other hand, convicts must be disciplined, and prison authorities must be given wide latitude and discretion in the management and operation of their institutions, including the disciplining of inmates. The Courts cannot take over the management of prisons, and they cannot undertake to review every complaint made by a convict about his treatment while in the prison.).

Judge Henley's efforts to reform the Arkansas prison system did not end with an injunction against whipping at the Arkansas Penitentiary, and *Talley* was not the last case that he would decide. In fact, until 1977, two years after he joined the Eighth Circuit Court of Appeals, Judge Henley presided over a series of cases involving the administration of the Arkansas prison system.¹⁴ His decisions were not limited to a single institution.¹⁵ They affected the entire prison system in the state.¹⁶ Ultimately, he condemned not just corporeal punishment, but the entire plantation prison system that worked the inmates for profit.¹⁷

To guide his decision-making, Judge Henley appointed lawyers to represent the plaintiff-prisoners, held hearings, listened to the testimony of expert witnesses, inspected the prisons himself, assigned special masters to implement court orders, and supervised the reform efforts.¹⁸ By the time the prison litigation was reassigned, Judge Henley, with the support of the Eighth Circuit, had succeeded in transforming the Arkansas prison system from top to bottom; and in so doing, he had re-interpreted the Constitution. Without a doubt, Judge Henley took an activist approach to his decision-making. He refused to confine himself to the relief requested by the initial inmate plaintiffs; instead, he issued broad injunctive relief requiring systemic reform.¹⁹ He issued many and very detailed orders. His involvement was administrative and managerial.²⁰

Feeley and Rubin applaud Judge Henley's aggressive and creative judicial policy making.²¹ Their treatise explains and justifies the form of judicial activism that Judge Henley's prison decisions exemplify.²² They suggest that before a judge will engage in this kind of work, the judge must be motivated and motivated by a discontinuity between the judge's personal moral belief and reality.²³ Second, the court must have a grant of jurisdiction that

14. FEELEY & RUBIN, *supra* note 5, at 55-74.

15. *Id.*

16. *Id.*

17. *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976); *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

18. *Sarver*, 309 F. Supp. at 364; FEELEY & RUBIN *supra* note 5, at 66-73.

19. *See* FEELEY & RUBIN, *supra* note 5, at 51-79.

20. *See id.* at 55-73.

21. *See id.* at 211-90.

22. *See id.*

23. When Judge Henley was confronted with a challenge to the arbitrary infliction of corporeal punishment,

authorizes action.²⁴ Third, the court must be able to formulate a “coordinating idea” or coherent philosophy providing the framework for action.²⁵ Finally, a judge confronted with an issue or a problem must be able to access the knowledge or information necessary to create a solution.²⁶

The motivation for intervention in the prison system was, in part, provided by the civil rights movement of the 1960’s.²⁷ Judges received letters from inmates describing the ghastly conditions of their confinement.²⁸ Many of the prisoners were African-Americans imprisoned in facilities run by white guards.²⁹ The conditions began to appear out of step with the civilization the United States government was trying to build outside the prison system—out of step with the civil rights movement and out of step with progress.³⁰ The racial divide between those who were serving time and those who supervised the punishment emphasized the cruel and backward nature of the confinement. There was a disparity between the conditions of the prisoners—about which the judges were becoming better and better informed—and the direction in which the rest of the nation was moving. At a time when the country was moving towards integration, equality and prosperity for all citizens, life in prison was mired in racism and oppression. The more the judges knew about the world behind bars, the more they were motivated to intervene.³¹

As to the second requirement, a grant of jurisdiction authorizing intervention, Feeley and Rubin suggest that Eighth Amendment jurisprudence, like the growth of First Amendment jurisprudence in the context of the prison religious discrimination decisions, provided the necessary foundation.³² The

[t]he dominant image of the South [in the 1960’s] was of a troubled, backward region in resentful transition, a region of red-necked sheriffs, segregation academies, police dogs, fire hoses, grinding poverty, and the murderers of Martin Luther King, Medgar Evers, and those New York civil rights workers. Federal judges probably felt more personally motivated to displace southern institutions than at any time since the early days of Reconstruction.

Id. at 221.

24. *See id.* at 207. “The first force . . . that acts upon judges when they are creating new doctrine is existing legal doctrine—not a particular text, but existing doctrine as a whole.” *Id.* at 213.

25. *See id.* at 233.

26. *See id.* at 162-67 (stating that the Berger Court would have overturned the prison decisions without the information in the national standards upon which the court relied).

27. *Id.* at 159.

28. *Id.* at 150.

29. *Id.*

30. *Id.* at 221.

31. *Id.*

32. *Id.* at 14-15, 171, 206-07.

Over a period of about five years, [Judge Henley] gradually realized that the totality of the conditions in the prison could be regarded as a generalized violation of the Eighth Amendment.

Eighth Amendment opened a doorway permitting scrutiny of prison conditions and application of constitutional principles to sentenced prisoners.

The third condition for judicial activism is the ability to frame what Feeley and Rubin term a "coordinating idea"—a judicial philosophy or theme to ground a specific decision.³³ Judge Henley developed two. One was the idea that prisons must provide rehabilitation³⁴ and the other was that the supervision of prisoners must be bureaucratized rather than arbitrary.³⁵ Judge Henley held that if a prison rule were not designed to rehabilitate, it could not be constitutional.³⁶ This insight gave form and organization to his intervention. Through that prism, he could look at any aspect of prison life from employment, to disciplinary rules, to visitation and access to the courts, and ask whether the prison rule served the goal of rehabilitation.

Even with a coordinating idea, courts need information to actualize a notion of fairness. The development of standards for the administration of prisons provided the information necessary to implement reform. The American Correctional Association ("ACA") published a *Manual of Correctional Standards* in 1946.³⁷ In 1959, the ACA published a second edition that "contained a new chapter entitled 'Legal Rights of Probationers, Prisoners and Parolees' . . . [which] enumerated a set of 'legal rights' for prisoners, actually policy standards drawn from various international sources."³⁸ Distributed in a usable, readable, and comprehensive form, the standards rendered the abstract notion of cruel and unusual punishment justiciable by providing the courts with concrete guidance about appropriate correctional behavior.³⁹

This enabled him to bypass the complex and perhaps insuperable task of matching specific conditions with specific constitutional provisions, or of defining particularized rights that prisoners possessed.

Id. at 226.

33. *See id.* at 226-33, 242. Once a court finds the moral imperative and the doctrinal authority justifying intervention, it must locate guidelines for action. There are a variety of ways to decide cases when there is little controlling precedent. Judges use analogies and metaphors and they listen to public policy arguments. Feeley and Rubin suggest that, in addition, courts can imagine a theoretical framework to explain their decision. *See id.* at 237-41.

34. *Holt v. Sarver*, 309 F. Supp. 362, 378-81 (E.D. Ark. 1970).

35. *Talley v. Stephens*, 247 F. Supp. 683, 689 (E.D. Ark. 1965).

36. *Sarver*, 309 F. Supp. at 379.

37. FEELEY & RUBIN, *supra* note 5, at 163.

38. *Id.* at 163.

39. AM. CORR. ASS'N, *MANUAL OF CORRECTIONAL STANDARDS* 266-79 (3d ed. 1966) at Part III Chapter 15; *see also* FEELEY & RUBIN, *supra* note 5, at 163 (noting that Chapter 15 is a new addition to the manual).

Once a framework for intervention was modeled, judges across the country eagerly applied the Constitution to prisons, ending brutal practices.⁴⁰ The judges were undaunted by the fact that their decisions would cost money and could be attacked as an arrogation of the legislative function. They were not intimidated by the traditional argument that courts do not have sufficient expertise to become involved in the management of prisons. Judges were asked to intervene to end brutal practices in prisons, and they did.⁴¹ Often the cases could not be decided with a simple order. In those cases, judges used innovative techniques to manage the litigation—techniques more typically employed by administrative agencies rather than courts.⁴² Most radical was the use of special masters—powerful “special assistants”—who investigated conditions and oversaw the implementation of orders.⁴³ Further, following the lead of *Monroe v. Pape*,⁴⁴ the judges used their injunctive powers—“enjoin[ing] prison administrators from maintaining any feature of the prison that failed to meet the rehabilitative standard.”⁴⁵ Finally, judges retained jurisdiction over the litigation, sometimes for years, to ensure that the changes they desired were implemented.⁴⁶

Courts that are asked to reform criminal defense delivery systems today are in much the same position as was Judge Henley in 1965. Exonerations of the innocent and exposés of malpractice by defense counsel in even the most serious prosecutions provide motivation for judicial intervention. Moreover, the job of improving indigent defense systems is uniquely suited to the judiciary. Courts are aware of the deficiencies in the delivery of criminal defense services.⁴⁷ Judges preside over criminal trials and pleas. They are

40. FEELEY & RUBIN, *supra* note 5, at 39-40 (“In the five-year period after the Arkansas case was decided, federal courts declared prisons in Mississippi, Oklahoma, Florida, Louisiana, and Alabama to be unconstitutional, in whole or part. Five years after that, prisons or prison systems in twenty-eight more jurisdictions had been added to this lugubrious list. . .”). *Id.*

41. See generally MUSHLIN, *supra* note 10, § 2.04, at 52 (commenting that “formal corporeal punishment has virtually disappeared from the correctional scene . . .” and discussing the effect of the Supreme Court decision in *Hudson v. McMillian*, 503 U.S. 1, 4-5 (1992)).

42. See generally MUSHLIN, *supra* note 10, § 2.14, at 117-19 (discussing remedies).

43. See *id.* at 75 (“The power to appoint a compliance coordinator, more familiarly known as a special master, is traditionally regarded as an inherent power of an equity court and is explicitly authorized by the Federal Rules of Civil Procedure.”).

44. 365 U.S. 167 (1961).

45. FEELEY & RUBIN, *supra* note 5, at 256.

46. The Arkansas prison system was subject to Judge Henley and later Judge Eisle’s jurisdiction for a total of seventeen years. See *id.* at 51-79.

47. HONORABLE JONATHAN LIPPMAN, CHIEF ADMINISTRATIVE JUDGE & HONORABLE JUANITA BING NEWTON, DEPUTY CHIEF ADMINISTRATIVE JUDGE, ASSIGNED COUNSEL COMPENSATION PLAN IN NEW YORK: A GROWING CRISIS (Jan. 2000) [hereinafter ASSIGNED COUNSEL REPORT] (on file with the Office

confronted by crowded calendars, hasty pleas and badly tried cases. Judges understand the role of the criminal defense lawyer and the significance of a zealous defense. Ultimately the courts are responsible for the administration of justice, not simply in individual cases,⁴⁸ but also systemically.⁴⁹ The unique role of the judiciary in supervising "justice," combined with the well-documented inadequacies of institutional defense services provide motivation for judicial intervention.

New tools exist to assist judges in formulating effective and far-reaching rulings about the inadequacies of criminal defense counsel. Until recently, courts faced with claims of constitutionally infirm public defense services lacked a functional definition of effective assistance of counsel that could be applied prospectively and systemically. The traditional, accepted way of measuring effectiveness of counsel in criminal cases is to review the representation after its completion.⁵⁰ Thus, a particular attorney's work on a specific case would be examined only after the conviction or appeal and only in relation to the results of the attorney's efforts. If the conviction were supported by the trial evidence, the attorney's performance generally would be deemed effective.⁵¹ Thus, the *Strickland* standard asks a reviewing court to focus almost exclusively on case outcomes.

However, if courts are concerned only with outcomes, they are more likely to be satisfied with a lawyer's efforts so long as his or her clients receive the "market" value for their cases.⁵² An after-the-fact approach

of Court Administration).

48. To be sure, courts have an arsenal of tools that could be aimed at improving the defense function. Judges are often aware that an individual assigned counsel or public defender is performing poorly for a client. When that occurs, the court may threaten the lawyer with sanctions, report the inadequacies to the appropriate administrative body, or substitute one counsel for another. Such action may or may not improve the lot of the particular defendant, but it most certainly does not affect broader change.

49. Cf. N.Y. LAW §§ 460-96 (McKinney 1983 & Supp. 2001) (courts have the inherent power to regulate the practice of law—as reflected by the statutes, such as New York's Judiciary Law, which delegate to the courts the authority to determine the qualifications for admission to practice).

50. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984) (reviewing an ineffective representation claim after the defendant had been convicted of the charges against him).

51. See *id.* discussed further *infra* at note 110, and accompanying text.

52. In any jurisdiction all cases have what the author refers to as a particular "market" value. "Market" value changes as it is affected by the fluctuating political priorities. If a neighborhood has recently complained about the presence of prostitutes on its streets, a local district attorney may respond by recommending tougher plea bargains to all arrested prostitutes, hoping that stricter sentences will force the trade into another part of town. The crackdown on prostitution will alter the "market value" of a prostitution case in that district attorney's jurisdiction. If all prostitutes are sentenced to thirty days in jail, then the court will believe that any prostitute who is sentenced to that number of days has been presumably effectively represented. Likewise the courts will believe that an attorney can effectively represent a large number of prostitutes very quickly so long as each one receives a sentence of thirty days.

minimizes the value of much of what an attorney does for a client during the pendency of the case. It devalues the time the attorney might spend explaining the charges to a client, investigating a drug treatment alternative to jail, or inquiring about care for the client's children during the jail term—let alone planning a challenge to the arresting officer's credibility.

Although some commentators have discussed using other kinds of standards to evaluate attorney performance, the idea has not generated much excitement.⁵³ Part of the reason for the lack of progress has been the difficulty of adapting existing performance standards to the task of evaluation.⁵⁴ Another part of the reason might be the reticence of the defense community to accept the idea that their professional role could be reduced to a set of skills, tasks, or competencies. Finally, part of the reason is likely that defense attorneys themselves tend to devalue all lawyering skills other than those which seem particularly necessary to a "good" outcome—e.g. a scathing cross-examination or a particularly comfortable knack for plea-bargaining.

53. There is wide-spread support for adoption and implementation of eligibility standards—especially in death penalty cases. See, e.g., Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation*, 29 IND. L. REV. 495 (1996) (discussing Indiana's rule attempting to provide more effective representation in such cases); Michael D. Moore, *Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and Their Application to Death—Eligible Defendants*, 37 WM. & MARY L. REV. 1617 (1996) (arguing that states should organize units specializing in representation of indigent defendants in capital cases). See also MUSHLIN, *supra* note 10. A few commentators have suggested evaluating attorney effectiveness with performance standards. See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 286-306 (1997) (arguing for the implementation of an *ex ante* standard for determining effectiveness of counsel in indigent defense cases) [hereinafter *Ex Ante Standard*]; William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181 (1984) (discussing how performance standards might improve the quality of criminal defense representation generally, and why they should replace the *Strickland* standard in case-by-case determinations of appeals for ineffectiveness of counsel); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 (1988) (to the same effect); *Ex Ante Standard*, *supra* (suggesting that institutional reform litigation, as well as the review of criminal individual cases, would benefit from a prospective (*ex ante*) approach to the evaluation of effectiveness where the standards would be parity a comparison of the resources of the defender office with the resources enjoyed by their adversaries—the prosecutors). Even Judge Bazelon used a standards-based approach to evaluate attorney effectiveness in *United States v. DeCoster*, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973), *rev'd* by 624 F.2d 196 (D.C. Cir. 1979). Chief Judge Bazelon used the ABA Standards and AMSTERDAM, SEGAL AND MILLER'S TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES to define ineffectiveness. *Id.* at 1203 nn.27, 28. His efforts were soundly rejected by the Circuit. See *DeCoster*, 624 F.2d at 205.

54. The various types of standards—performance, eligibility, and administration—as well as their particular strengths and weaknesses are discussed *infra* Part IV.

There is evidence, however, that defense attorneys today see their roles differently than did their predecessors twenty-five years ago.⁵⁵ New defender offices are emphasizing a holistic approach to client representation,⁵⁶ and the federal government is encouraging this development by funding alternative courts and supporting defense lawyers who focus on client treatment and diversion.⁵⁷

At the same time, the defense community has been increasingly interested in standards. Assigned Counsel Plans are adopting "Eligibility Standards" detailing the experience and training required for assignment to particular classes of cases.⁵⁸ "Performance Standards" describe case preparation tasks.⁵⁹ "Administration Standards" guide the operation of institutional providers.⁶⁰ This interest has coincided with an invigorated regard for a wide range of clients' pre-trial due process rights.

55. See generally Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994-1995) (suggesting that defenders and the entire criminal justice system should learn more about the clients and their personal histories so that juries can see crime in context and be given an opportunity to empathize with defendants as well as with victims).

56. See, e.g., Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Institutional Boundaries of Providing Defense Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 427-58 (2001) (discussing many examples, including, The Bronx Defenders, a new contract office in New York City, that sends its staff attorneys into the schools to explain the value of criminal defense, provides free AIDS and HIV testing to clients, and makes its extensive social work services available to clients).

57. The federal government has been instrumental in supporting "problem-solving" courts where persons arrested for crimes are diverted into treatment and community service. See, e.g., DRUG COURT CLEARING HOUSE AND TECHNICAL ASSISTANCE PROJECT, DRUG COURTS PROGRAM OFFICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS (last visited Nov. 12, 2001), available at <http://www.ojp.usdoj.gov/dcpo/decade98.htm>; ERIC LEE, U.S. DEP'T OF JUSTICE, COMMUNITY COURTS: AN EVOLVING MODEL, available at <http://www.ncjrs.org/pdffiles1/bja/183452.pdf> (2000). In these courts, characteristically judges, prosecutors and defenders must work together, as collaborators not adversaries, to formulate solutions to defendants' problems. The "problem-solving" approach may educate the courts to the importance of case processing.

58. In recent years, standards for defense services have proliferated. The Institute for Law and Justice, supported by the Bureau of Justice Assistance, United States Department of Justice, has just published electronically a Compendium of Standards for Indigent Defense Systems which includes a broad range of standards. INSTITUTE FOR LAW AND JUSTICE, *Compendium of Standards For Indigent Defense Systems*, available at <http://www.ojp.usdoj.gov/indigentdefense/compendium/welcome.html> (2000) [hereinafter *Compendium*]. STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS (National Legal Aid and Defender Ass'n 1989).

59. *Compendium*; STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (1993).

60. *Compendium*; GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (National Legal Aid and Defender Ass'n 1976); GENERAL REQUIREMENTS FOR ALL ORGANIZED PROVIDERS OF DEFENSE SERVICES TO INDIGENT DEFENDANTS (New York City Indigent Defense Org. Oversight Comm. 1997).

The development and implementation of standards for the delivery of defense services is both a reflection of the changing conception of defense work and a trigger for change.⁶¹ Not only do performance standards incorporate a broad range of lawyering skills as essential components of the defense function, but the very process of developing standards (whether performance, eligibility or administration standards) suggests the business of providing defense services is becoming more organized, methodical, and ultimately more amenable to evaluation. Although standards may serve multiple other purposes,⁶² they also provide courts with a better measure for evaluating defense delivery systems than a measure that considers only outcomes. Standards make challenges to defense delivery systems more justiciable.

Additionally, today sufficient precedent exists to support judicial intervention. Lawsuits brought by attorneys asserting their own constitutional rights have paved the way for claims asserting the rights of defendants to quality defense services.⁶³ Challenges to underfunded and overburdened public defenders, assigned counsel programs, and contract providers have been mounted successfully in a number of jurisdictions—both rural and urban.⁶⁴ This litigation has pushed courts to re-consider the meaning of constitutionally “effective” representation and to recognize that effective assistance of counsel can be measured prospectively by looking at working conditions and pre-trial preparation.⁶⁵

In this article, I first, suggest that the current deplorable state of criminal defense services should provide a motivation for judicial action. Then, I review the precedent providing the foundation for judicial action. In the third section, I discuss the standards applicable to defense services. In the final section, I speculate about the changing role of the criminal defense attorney and how that evolution might hasten judicial action.

61. *Compendium*; Performance, eligibility and administration standards are discussed *infra* Part IV.

62. Standards can be used to educate the public and funding sources about what it takes to provide quality defense services, to provide notice to the organizations of what is expected of a publically funded defense office, and as an internal training tool for the lawyers employed in a defense organization. Adele Bernhard, *Private Bar Monitors Public Defense*, A.B.A. CRIM. JUST. MAG., Spring 1998, at 25-30.

63. See discussion *infra* Part III.A.1.

64. See discussion *infra* Part III.B.

65. See discussion *infra* Part III.

II. MOTIVATION FOR INTERVENTION: INSTITUTIONALIZED INEFFECTIVENESS

Most people arrested and charged with a criminal offense are too poor to hire their own counsel.⁶⁶ Since 1963, courts have guaranteed counsel, appointed free of charge, to everyone charged with a crime punishable by loss of liberty.⁶⁷ Organizing the provision of these essential services to the millions arrested each year⁶⁸ has been a daunting task, made more difficult by the judicial resistance to actively ensuring effective or meaningful assistance,⁶⁹ and by the public's lack of support for the function.⁷⁰ Defense services for the poor are structured either as assigned counsel plans, private for-profit or not-for-profit law firms with government contracts to provide services, or public defender offices. The quality of services provided varies tremendously.

A. Assigned Counsel Plans

Assigned counsel, private practitioners who are paid by the hour from public funds, represent the majority of people arrested in this country.⁷¹ To be appointed to cases, assigned counsel attorneys generally are required to do

66. In many jurisdictions, public or assigned defenders represent the overwhelming majority—as many as 90%—of those arrested. See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 31-32 (1995). CAROLINE WOLF HARLOW, U.S. DEPARTMENT OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES (2000) (reporting that in 1996 court-appointed counsel represented 82% of all persons charged with a felony in the 75 largest counties in the country).

67. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the right to counsel is fundamental for a fair trial); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that the Sixth Amendment guarantees the right to counsel to all indigent criminal defendants).

68. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS <http://www.albany.edu/sourcebook/1995/pdf/t549.pdf> (last updated Sept. 19, 2001) (in 1996 there were approximately one million felony and eight million misdemeanor arrests in the United States).

69. Judicial reluctance to enforce Sixth Amendment rights in a meaningful way has taken many forms. Most important has been the Supreme Court decision in *Strickland v. Washington*, 466 U.S. 668 (1984), which many commentators blame for judicial acceptance of egregiously deficient lawyering. See, e.g., Klein, *supra* note 4 (arguing that *Strickland* will be negative precedent); Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 564-65 (1988) ("*Strickland*'s impact on the ability of an ineffectively represented defendant to overturn the subsequent conviction is devastating.").

70. Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 86-87 (Winter 1995).

71. See Spangenberg & Beeman, *supra* note 66, at 31.

no more than put their names on a list. Neither experience nor qualifications beyond admission to the bar are reviewed and participation in training programs is not required. Recertification is not necessary. Competence is never reviewed. Membership lasts forever. Attorneys stop taking assignments when it suits them.⁷² Often, as in Texas, judges administer the plans and, without any standards or rules, choose which attorneys will be assigned to cases.⁷³ As a result, tens of thousands of poor people in this country, particularly in rural counties, are represented by attorneys whose competence to handle cases—serious or minor—has never been subject to peer review and who are assigned to their clients by the judges who will 1) preside over the case; 2) pass on their requests for attorney fees; and 3) decide whether they will have access to investigators and experts.⁷⁴

In organized plans administered by an independent manager, rather than by the presiding judge, attorneys generally must meet specific skill and knowledge criteria to be assigned to certain types of cases.⁷⁵ Administrators screen candidates, rotate assignments, and try to insulate attorneys from judicial influence and pressure. However, even in those plans, attorneys must seek court approval for expert and investigative services, as well as for their own fees.⁷⁶ Busy calendar judges managing full dockets have an incentive to resolve cases, and the quickest resolution is generally a plea bargain. Judges are often less than generous in permitting the hire of investigative services for cases that they have a strong interest in resolving quickly, or in approving fees

72. In New York City in the mid-1990's, the Presiding Judge of the Appellate Division First Judicial Department (with jurisdiction over the Bronx and Manhattan) required all Assigned Counsel Plan lawyers qualified to handle felony cases to re-apply to the panel. The re-certification process, which took over five years and required thousands of hours of volunteer attorney time, eliminated approximately 200 (10%) of the plan lawyers—presumably those who were the least qualified. As far as I know, this remains the only such effort to re-evaluate assigned counsel plan lawyers subsequent to their acceptance onto a panel. Interview with Norman Reimer, Esq., chair of the Assigned Counsel Screening Committee during the re-application process.

73. ALLAN K. BUTCHER & MICHAEL K. MOORE, *MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS*, available at <http://uta.edu/pols/moore/indigent/last.doc> (Sept. 22, 2000); TEXAS APPLESEED FAIR DEFENSE PROJECT, *THE FAIR DEFENSE REPORT: FINDINGS AND RECOMMENDATIONS OF INDIGENT DEFENSE PRACTICES IN TEXAS*, available at http://www.appleseeds.net/tx/Fair_Defense_Rpt_Findings_and_%20Recommendations.pdf (Dec. 2000); Moore, *supra* note 53, at 1635-36 (reporting that, in Texas, judges appoint lawyers even to capital cases based on 'subjective criteria' such as friendship or political support).

74. See BUTCHER & MOORE, *supra* note 73.

75. Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176, 177-78 (1985).

76. See, e.g., ASSIGNED COUNSEL REPORT, *supra* note 47.

necessitated by time spent conducting legal research that the judge may believe is unnecessary.⁷⁷ Attorneys themselves are sometimes hesitant to push aggressively for services on behalf of a client who will likely end up pleading guilty once the pre-trial work has been completed. No one wants to look as though he or she is wasting time and money. The attorney is caught between obligations to the court and to the client. When the client is not paying, and may be morally unattractive, emotionally or mentally disabled, and uncooperative, it is hardly surprising that an assigned attorney would feel a keen desire to please the court to which he or she returns each day. This tension creates a powerful conflict for the assigned counsel who may fear that mounting a zealous defense will endanger regular appointments.⁷⁸ Independence and zealous advocacy can be compromised.⁷⁹

Moreover, assigned counsel plan lawyers are frequently paid at rates so low that only lawyers who are beginning their practice or those who were previously unsuccessful in the business of law will agree to take assignments.⁸⁰ In New York City, lawyers who accepted court appointed, non-capital, criminal cases in the state courts in 2001 were paid at the rate of twenty-five dollars for an hour of out-of-court time and forty dollars for an hour of in-court time—less than they would have been paid in Alabama for the same work.⁸¹ The low rates force attorneys, who make their living through

77. See BUTCHER & MOORE, *supra* note 73.

78. See *id.*

79. Dripps, *supra* note 53, at 252-54 (describing the pressure on publically funded defenders as dual: horizontal pressure caused by the incentive to dispose of some cases in order to have more time for others; vertical pressure caused by the incentive to please the funding source).

80. ASSIGNED COUNSEL REPORT, *supra* note 47, "Inasmuch as the current assigned counsel rates do not even meet law practice overhead costs in many areas of [New York State], it is no surprise that attorneys are either removing their names from assigned counsel panels, remaining on the panels but refusing to take assignments, or showing no interest in involving themselves in assigned counsel work at all," *id.* at 9; Albert L. Vreeland, II, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 643 (1991) ("The appointed counsel system has been roundly criticized for its failure to attract qualified counsel and its reliance on younger, inexperienced attorneys. . .").

81. N.Y. COUNTY L. ART. 18-B increased the fees to twenty-five dollars and forty dollars in 1986; see also THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW (Oct. 1997) (noting that Alabama pays fifty dollars per hour for in-court work and thirty dollars per hour for out-of-court work). Since 1986 in New York City where rates for assigned counsel in criminal and family court cases have been frozen for sixteen years at the punishingly low rate of twenty-five dollars an hour for out-of-court and forty dollars for in-court counsel time, the courts are rebelling. As family court lawyers increasingly refuse to take on new matters at those rates, some family court judges have unilaterally decided to pay attorneys seventy-five dollars an hour, despite the statute. See, e.g., Anthony S. v. Patricia S. (Fam. Ct. Dutchess County), published in N.Y. L.J., Feb. 1, 2001, at 32 (implying that the statutory limit is inadequate).

assigned cases, to accept a large volume of cases, to limit out-of-court time (preparing motions, conducting investigations, and researching the law), and to minimize expenses—responses antithetical to effective representation.⁸² Assigned counsel plans that underpay drive the most conscientious lawyers away from indigent defense work.⁸³

In addition to low hourly rates, many state or county assigned counsel systems reimburse no more than a maximum number of hours—even on capital cases.⁸⁴ The Texas Court of Criminal Appeals, for example, limits lawyers to one hundred fifty hours on a capital case—despite the fact that a local state bar association committee found that it takes between four hundred and nine hundred hours of time to prepare such cases adequately.⁸⁵

B. Fixed Price Contract Providers

The greatest problems with inadequate defense counsel are created by low-bid fixed-price contracts where a law firm agrees to accept all assignments arising in a given jurisdiction, over a set period of time, at a fixed price. Attractive to governments concerned with containing costs and accurately predicting expenditures, fixed-price contracts risk reduced quality provided to defendants, especially when contracts are awarded through competitive bidding. Death penalty lawyer Stephen Bright has noted that, “[m]any jurisdictions process the maximum number of cases at the lowest possible cost without regard to justice.”⁸⁶ He describes one particularly striking example of low-bid contracting that occurred in McDuffie County, Georgia. In that county, the county commission hired attorney Bill Wheeler, whose \$25,000 bid for the year was almost \$20,000 lower than the next closest contender, to handle all local criminal cases in the county.⁸⁷ After four

82. Vreeland, *supra* note 80, at 644-45. See also Michael McConville & Chester Mirsky, *Criminal Defense of the Poor in New York*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 696-902 (1986-87) (discussing the practices of appointed counsel and comparing these practices with those of the Legal Aid Society).

83. Victoria Rivkin, *18-B: A System Overloaded—Experts Say Lack of Respect, Low Pay Cause Exodus in System for Assigning Counsel*, N.Y. L.J., June 15, 2000, at 1.

84. N.Y. COUNTY L. ART. 18-B, § 722-b. The caps set by statute in New York are \$1,200 for a felony, \$800 for a non-felony and \$2,400 for a capital case. These limitations may be exceeded upon a showing of extraordinary circumstances. *Id.*

85. Bright, *supra* note 4, at 807.

86. *Id.* at 788.

87. *Id.*

years of contract service, Wheeler tried only three cases and filed only three motions, but entered 313 guilty pleas.⁸⁸

C. Public Defense Offices

Public defender programs have the best chance of delivering adequate services. "When adequately funded and staffed, defender organizations employing full-time personnel are capable of providing excellent defense services."⁸⁹ Generally, a public defender is a public or private not-for-profit organization staffed by attorneys whose exclusive responsibility is handling criminal cases. In large public defender offices, attorneys are trained, supervised, and supported by investigators, paralegals and clerical staff. The attorneys develop considerable expertise.⁹⁰

However, no matter how effective the structure, inadequate funding adversely affects all defense systems.⁹¹ When budgets are tight, defense organizations make difficult decisions about how to spend their funds.⁹² Staff vacancies are not filled and caseloads rise. Social workers and investigators shoulder too many assignments and spend insufficient time working with individual clients. Everyone on staff selects among individuals represented by the office and compromises on services. Lawyers are compelled to spend more time in court, answering calendar calls on behalf of their greater number of clients, and less time in the field or in the library.⁹³ Lawyers who carry too many cases inevitably pressure clients to plead guilty.⁹⁴ Crucial decisions in cases are made on the basis of too little fact investigation.⁹⁵

88. *Id.* at 789.

89. ABA, CRIMINAL JUSTICE STANDARDS COMMITTEE, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, at Commentary to Standard 5-1.2. (3d ed. 1992).

90. See Ogletree, *supra* note 70, at 85.

91. See generally Spangenberg & Beeman, *supra* note 66 (noting that inadequate funding results in excessive caseloads and inexperienced counsel).

92. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 35-44 (1997).

93. In New York City, the Indigent Defense Organization Oversight Committee, a committee of the Supreme Court of the State of New York, Appellate Division, First Department, with the responsibility to evaluate defense services provided by the providers other than the assigned counsel program (discussed in detail *infra* at note 265 and accompanying text) found in its *Report for 1997* that a reduction in funding caused the Legal Aid Society in New York City to "handle too many cases with too little staff" and that "clients are not receiving the services they deserve." INDIGENT DEFENSE ORGANIZATION OVERSIGHT COMMITTEE, *Report for 1997*, 17 (1998) (available from the Appellate Division, First Department).

94. Klein, *supra* note 4, at 672-73.

95. *Id.* (reporting that a study of the plea bargaining process in Boston discovered that the Massachusetts Defender Committee depends on plea bargaining to avoid trials which the office would be

Lack of funding for the defense function is certainly the single greatest factor adversely affecting quality.⁹⁶ Nonetheless, responding to the perceived anti-crime attitude of the voting public, state legislatures have skimmed on financial support for the defense.⁹⁷ Efforts to convince legislators to spend more on defense have been remarkably unsuccessful.⁹⁸ In some localities defense attorneys have tried to enlist other participants in the criminal justice system—departments of correction, prosecutors and court administrators—to assist in pressing the case for increased funding to local legislators.⁹⁹ In others, defenders have urged the creation of special commissions to study and make recommendations to the state legislators.¹⁰⁰ Groups of defense lawyers,

unable to provide and that the larger the area served by the agency, the more excessive the caseloads). As attorney caseloads increase, so do guilty plea rates. *Id.* In 2000 in New York City, Assigned Counsel Lawyers handled 177,965 new defendants in the Bronx and Manhattan, 124,177 of those cases were disposed of at the first appearance—most by a plea of guilty entered after no more than a ten-minute consultation with their lawyers. REPORT OF THE ASSIGNED COUNSEL PLAN ADMINISTRATOR FOR THE FIRST DEPARTMENT FOR FISCAL YEAR 1998 (on file with the author).

96. See generally Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995) (discussing the responsibilities of appointed attorneys, the problem of underfunding these defense systems, and the death penalty).

97. COLE, *supra* note 1; Stuntz, *supra* note 92, at 4 (“As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs. Severe limits on defense funding are the most obvious example, but not the only one.”). See generally Dripps, *supra* note 1 (discussing the proposition that legislatures generally prefer limited restrictions on law enforcement mechanisms).

98. As mentioned earlier, *supra* note 81, in New York State assigned counsel rates have not been increased since 1986 despite yearly lobbying efforts. In 1999, for example, the New York State League of Women Voters and the New York State Defenders Association, a not-for-profit organization that provides research, training and technical support for defenders, sponsored a series of hearings on the state of criminal defense services in an unsuccessful attempt to convince the state legislature to raise the assigned counsel rates for family and criminal court cases. Each year a group of lawyers from across the state travel to the state capital in an effort to raise fees. So far there has been no action. John Caher, *Coalition of Lawyers Protests Low Assigned Counsel Fees*, N.Y. L.J., Mar. 15, 2000, at 1, col. 3.

99. The Federal Department of Justice has heavily supported these efforts to improve services through collaboration. The Department of Justice has sponsored two symposia on indigent defense where representatives of defender organizations, prosecutorial agencies and members of the courts were paid to travel to Washington D.C. and work together in small teams envisioning ways to improve the quality of defense services. DEPARTMENT OF JUSTICE, *Indigent Defense—Publications—Paper and Otherwise*, available at <http://www.ojp.gov> (last visited Nov. 13, 2001).

100. Cf. The Spangenberg Group, *2000 State Legislative Scorecard: Developments Affecting Indigent Defense*, THE SPANGENBERG REPORT, Nov. 2000, at 6, 15 (reporting that

[i]n January 2000, the 25-member [sic] West Virginia Task Force recommended to the Governor and Legislature that the budget for West Virginia Public Defender Services (PDS) be increased for the specific purposes of: increasing salaries of PDS staff to competitive levels; hiring qualified management-information systems staff; and operating an auditing division, resource center and appellate division as required by [local] statute).

Earlier, the Group reported that the North Carolina General Assembly enacted the Indigent Services Act

both those assigned individually to cases and those employed by defense organizations, have attempted collective action to raise salaries and improve working conditions through strikes.¹⁰¹

Additional pro bono service provided by volunteer lawyers might relieve some of the pressures on public defense,¹⁰² but ethical obligations are inadequate incentive for the private bar to contribute much in time or money toward criminal defenses. Better training, monitoring, and evaluation of defenders and defense systems will make a difference, but without additional resources, only to a limited degree.

III. JURISDICTION: USING THE SIXTH AMENDMENT TO REFORM THE QUALITY OF SERVICES PROVIDED BY INSTITUTIONAL DEFENDERS

Legal challenges to the constitutionality of services supplied by institutional criminal defense providers or assigned counsel plans have arisen in two ways. On the one hand, lawyers have confronted fee structures and assignment systems that require them to work for free or nearly so.¹⁰³ These lawsuits have been more successful in protecting lawyers than in improving lawyering services for clients. They are worth reviewing because it was in this context that the courts found their inherent power to participate in the administration of public defense services.

On the other hand, defendants, public defenders, bar associations, and law reform organizations have attacked delivery systems for their allegedly unconstitutional deprivation of defendants' Sixth Amendment right to counsel.¹⁰⁴ There are only a handful of these decisions. Not every court

of 2000, which creates an independent agency in the state's judicial department to oversee and improve the quality of defense services in that state. The Spangenberg Group, *North Carolina Legislature Gives Green Light to New Statewide Indigent Defense Program*, THE SPANGENBERG REPORT, Aug. 2000, at 11, 11-13.

101. James S. Kunen, *No Justice for These Lawyers*, N.Y. TIMES, Sunday, Oct. 8, 1994, at A2. See Frances A. McMorris, *Giuliani's Hard Line Breaks Strike at New York City Legal Services*, WALL ST. J., Oct. 6, 1994, at B11. See also *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (where a group of attorneys who routinely represented indigent defendants refused to do so until the District of Columbia increased their compensation for such work).

102. See David Rohde, *Victory in Schools Suit Spotlights Need for Free Legal Work*, N.Y. TIMES, Jan. 22, 2001, at B3.

103. See discussion *infra* Part III.A.1.

104. If lobbying, public education campaigns, and efforts at collaboration fail to raise funds for the defense function, litigation should be considered. Although funding and managing a complicated constitutional claim can be daunting, a lawsuit has the potential to trigger change in a number of ways, even pre-trial. Filing alone may generate publicity that educates the public and legislators. See, e.g., Michael A. Riccardi, *Second Lawsuit Challenges Rule 18-B Fee Schedule*, N.Y. L.J., Feb. 22, 2000, at 1 (discussing a New York lawsuit challenging the compensation system for attorneys representing indigent defendants).

confronted with a challenge to an overburdened public defense system has agreed to construe a local statutory scheme for providing services.¹⁰⁵ The litigation presents a number of difficulties—both legal and political.

First, federal abstention doctrine¹⁰⁶ has forced litigation into state courts which are more reticent policy-makers than federal courts.¹⁰⁷ Further, the complexity of the issues and the breadth of potential solutions disincline courts from undertaking problem-solving on a large scale.¹⁰⁸

Second, courts may have been dissuaded from taking action by the unacknowledged but pervasive belief that anyone who has been arrested is guilty—a belief which inevitably minimizes the significance of all else in the criminal justice system besides the swift resolution of cases. The presumption of guilt is a “core belief shared by virtually all personnel who work within the criminal justice system”¹⁰⁹ and a major hindrance to improving criminal defense services.¹¹⁰ If judges suspect that everyone arrested is guilty, it is hard to convince them to strike as unconstitutional state-funded criminal defense systems that rush pleas or discourage legal research and creative investigation. Judges are not likely to order the expenditure of funds to hire lawyers and support staff when convinced of guilt and worried that additional support will only slow the process of adjudication not change results. Further, if judges

If the claim can survive a motion to dismiss, the state or county responsible for administering the plan may decide to settle on favorable terms. That was the effect of litigation in Connecticut and Allegheny County, Pennsylvania. *See generally* Rivera v. Rowland, No. CV 950545629S, 1996 WL 636475 (Conn. Super. Ct. Oct. 23, 1996) (denying defendants' motion to dismiss).

105. *See generally* Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996) (see discussion *infra* at Section III.B.2).

106. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (explaining the reluctance of federal courts to issue injunctions regarding proceedings pending in state court) (see discussion *infra* at Section III.B.4).

107. Whether elected or appointed, state court judges are naturally more sensitive to the approval of politicians and the voting public than are federal judges who hold life tenure.

108. Student Note, *The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687 (1983) (noting that because the Constitution allocates the power to appropriate public funds to the legislature, courts hesitate to invoke the inherent power doctrine to compel appropriations, even for the purposes of funding judicial operations).

109. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1329 (1997).

110. *See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1741 (1993) (arguing that the presumption of guilt can be ascribed to the attractive, although frequently misguided, conviction that police only arrest guilty people; even though the public will happily speculate about the accuracy of a police investigation in a particular case, especially when the details of the case are highly publicized and familiar, people generally believe that police arrest the guilty. “These predispositions can be ascribed to several . . . causes: the basic feeling that where there’s smoke, there’s fire . . . ; [gratitude to the police for protection against crime]; . . . obedience to authority and the well-known ‘belief in a just world. . . .’”). *Id.* (footnote omitted).

focus exclusively on essentially ministerial closing of cases, it will continue to be difficult to move them to care about sentencing, diversion or rehabilitation - all of which require attention and time.

The presumption of guilt helps to explain why the Supreme Court formulated an almost insurmountable standard of review for ineffective assistance claims on appeal. In *Strickland v. Washington*,¹¹¹ the Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."¹¹² In other words, egregiously negligent work will be excused if the reviewing court is not convinced that a better effort would have produced a different result.¹¹³

The problem with the *Strickland* standard was captured by Justice Marshall in dissent:

[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer.¹¹⁴

The *Strickland* majority opinion overlooks the simple fact that the prosecutor's evidence will always appear unassailable when counsel for the accused neglects to conduct an investigation or fails to challenge the state's version of the case. Ultimately, the decision deprives persons, against whom the prosecution has collected persuasive evidence—even if that evidence is misleading—of the right to effective assistance of counsel.¹¹⁵

Now that the explicit effects of inadequate lawyering have been highlighted by research and media attention, courts should be less willing to blindly ignore the ineffectiveness of the lawyers who appear before them¹¹⁶

111. 466 U.S. 668 (1984).

112. *Id.* at 686.

113. See Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1445-52 (1999) (discussing how the *Strickland* decision excuses the most excruciatingly deficient representation by characterizing mistakes and omissions as tactics).

114. *Strickland*, 466 U.S. at 710.

115. William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995).

116. See, e.g., *Burdine v. Johnson*, 231 F.3d 950, 964 (5th Cir. 2000) (holding that despite the fact that a lawyer slept through substantial portions of prosecution witness testimony in a capital murder trial, the court could not presume constitutional ineffective assistance under *Strickland*).

and motivated instead to improve the delivery of services. Existing doctrine grounds judicial action.

A. *Fee Litigation—Adequate Attorney's Fees*

1. *Fifth Amendment Rights of Counsel*

Until the 1960s, state courts compelled attorneys to represent indigent clients without compensation, as an obligation incidental to the privilege of practicing law.¹¹⁷ As the task of representing the criminally accused grew, assigned counsel began to argue that assignment without compensation was a “taking” of private property for public use, a violation of due process, and a denial of equal protection.¹¹⁸ The “takings” cases provided a gateway for court involvement in assuring quality defense services for the poor. Courts that might have hesitated to intervene on behalf of defendants were willing to assist the lawyers who practiced before them.

Beginning around 1965, perhaps in response to the changes wrought by the *Gideon*¹¹⁹ decision and the Warren Court's focus on the importance of individual rights,¹²⁰ lower courts began to listen to the “takings” arguments. That year the Supreme Court of New Jersey declared that members of the bar should not be required to absorb the full cost of defending the poor.¹²¹ New Jersey pointed out that the burden of criminal assignments had increased, not only in number, but also in complexity.¹²² As a result, the Court held that taxpayers should share in the cost of representing the indigent. Fees paid for assigned counsel work could be lower than market rate, but would “reimburse

117. *Commonwealth v. Johnson*, 187 A.2d 761 (Pa. 1963). There, the Court appointed counsel to represent an indigent defendant on trial for murder. *Id.* at 761. After conviction, the trial judge directed payment of \$500, the maximum allowable under state law, to counsel. *Id.* The conviction was appealed; the court ordered a new trial, but mid-way through the new trial, the defendant pled guilty. *Id.* at 761-62. Counsel applied for additional fees, but the request was rejected. *Id.* at 762. Although the court agreed that the \$500 fee was inadequate for the services rendered, it held that the power to fix compensation was a legislative prerogative. *Id.* at 762-63.

118. *Vreeland*, *supra* note 80.

119. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

120. See generally ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 148-73 (2d ed. 1994) (discussing Court decisions regarding civil rights, freedom of speech, protection of criminal defendants, gender and equal protection). McCloskey noted that the Warren Court selectively incorporated “most of the criminal-procedure provisions of the Bill of Rights into the Fourteenth Amendment as a limit on the states.” *Id.* at 158.

121. *State v. Rush*, 217 A.2d 441, 448 (N.J. 1966).

122. *Id.*

assigned counsel for his overhead and yield something toward his own support."¹²³

In 1976, the West Virginia Supreme Court agreed that requiring attorneys to represent the indigent could be an unconstitutional "taking."¹²⁴ The Court held that when an attorney has so many appointments that it interferes with his ability to "engage in the remunerative practice of law," or that the costs associated with such defenses substantially "reduce the attorney's net income . . . the requirements must be considered confiscatory and unconstitutional."¹²⁵

By 1987, the majority of courts were conceding that the cost of representing the indigent should be shared between the public and the bar.¹²⁶ But once state courts reached consensus that attorneys must be paid fairly to represent the indigent—something less than market value but something more than a 'confiscatory' rate—the fee litigation strategy faltered as a mechanism for prompting change. Arguments addressing the rights of attorneys to be free from compelled and uncompensated labor could not be refocused to assert the rights of the accused to effective counsel.

Litigation in Kansas illustrates the difficulty with the fee litigation strategy. In *Stephan v. Smith*,¹²⁷ Orville J. Cole, an experienced trial lawyer, was appointed to represent three separate indigent defendants in their individual criminal cases.¹²⁸ Shortly thereafter, he petitioned the appointing court to relieve him because the maximum permitted compensation was insufficient to cover even his minimum office costs, and because he feared that inadequate compensation would affect his ability to provide effective

123. *Id.* at 448.

124. *State ex rel. Partain v. Oakley*, 227 S.E.2d 314, 319 (W. Va. 1976).

125. *Id.* at 319.

126. *See DeLisio v. Alaska*, 740 P.2d 437 (Alaska 1987). There, the attorney appointed to represent the defendant in a child sexual abuse case refused to proceed, arguing lack of competency to handle a criminal case, and that requiring him to represent the defendant without "reasonable compensation" constituted "a taking of private property for public use." *Id.* at 438-39. On appeal from the contempt citation, the Supreme Court of Alaska reversed. *Id.* The court rejected the competency argument, but held that an attorney cannot be forced to represent a client for free as a condition of his license to practice law. *Id.* *See also* *People v. Johnson*, 417 N.E.2d 1062 (Ill. App. Ct. 1981) (holding that the trial court abused its discretion by awarding the court-appointed attorney less than eight dollars per hour); *Hulse v. Wifvat*, 306 N.W.2d 707 (Iowa 1981) (eliminating fixed fees and allowing courts to compensate attorneys for reasonable and necessary time); *State v. Boyken*, 637 P.2d 1193 (Mont. 1981) (holding that awarding fees lower than overhead costs constituted an abuse of discretion); *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. 1985) (holding that a court cannot require an attorney to represent a client without compensation).

127. 747 P.2d 816 (Kan. 1987).

128. *Id.* at 821.

representation.¹²⁹ He recognized that the rate of compensation created a conflict between his needs and those of his client.¹³⁰

The local trial court consolidated the case with another similar assigned counsel matter and held evidentiary hearings.¹³¹ At the close of the hearings, the court filed an order establishing new rules and panels for indigent defense services, in addition to requiring that counsel be paid reasonably.¹³² To implement the ruling, the court declared any person not represented by an assigned counsel within thirty days would be presumed to have received ineffective assistance of counsel—a rebuttable presumption.¹³³ On interlocutory appeal, however, the Supreme Court narrowed the scope of the ruling, striking the Kansas compensation scheme on quite different grounds, as unconstitutionally impacting on Kansas attorneys' equal protection rights, and held only that "[t]he indigent defendant has a right to competent counsel . . . [but] has no right to adequately paid counsel. . . ."¹³⁴

2. Fee-Capping & Judicial Discretion

State statutes setting inflexible maximum assigned counsel fees have been successfully challenged as unconstitutionally limiting the power of the judiciary to administer justice. Such challenges seemed unlikely in 1963 when at least one court was unwilling to award an additional fee to a lawyer

129. *Id.*

130. *Id.* at 821. A number of fairly recent state court decisions have addressed the questions of whether financial stress caused by low assigned counsel fees creates a conflict between the attorney and the client sufficient to require reversal of a conviction. See discussion *infra* Part III.A.3.

131. *Stephan*, 747 P.2d at 821-22.

132. The court held that reasonable compensation was sixty-eight dollars—the amount then necessary to cover office expenses in Kansas at the time. *Id.* at 822.

133. *Id.*

If reasonable compensation is not available for an attorney and does not become so available within 30 [sic] days after a defendant is determined to be indigent and effective assistance of counsel is not available to such indigent defendant at the end of such period, the charges against such defendant shall be dismissed without prejudice.

The trial court further created a list of attorneys qualified to serve on the assigned counsel plan. *Id.*

134. *Id.* at 833. When Cole was appointed to this case, Kansas had three ways of providing counsel to the indigent. *Id.* at 845. Some counties had public defender programs; some had voluntary assigned counsel plans; and still others had mandatory assigned counsel plans. *Id.* Not surprisingly, the attorneys who were conscripted into service were unhappy. *Id.* The Kansas Supreme Court held that the plan was unconstitutional because it affected different groups of attorneys differently, violating the attorneys' equal protection rights. *Id.* at 846. Furthermore, it set aside those portions of the lower court orders which defined reasonable compensation in dollar amounts as well as those which mandated dismissal of charges unless compensation were provided. *Id.* at 850.

who tried a murder case for the second time.¹³⁵ But within fifteen years, as the number of lawyers specializing in criminal practice grew along with the number of criminal cases, attitudes had radically changed. Judges were willing to disapprove those state statutes that directly circumscribed their discretion by capping fees at a set maxima or by failing to provide an override mechanism for the exceptionally lengthy or difficult case.¹³⁶

In these decisions, courts recognized, at least implicitly, that low fees and arbitrary maximum expenditures adversely affect the representation afforded to indigents. In Florida, for example, attorney Robert Makemson was appointed to represent one of four co-defendants charged with the kidnaping and murder of a member of a "prominent local family."¹³⁷ Prosecutors threw enormous resources into the trial. "Three prosecutors and two special investigators sat at the counsel table, and over one hundred witnesses and fifty depositions were involved in the trial."¹³⁸ Mr. Makemson was on his own. In addition, to avoid the extensive and prejudicial pre-trial publicity, he successfully moved for a change of venue and thus was forced to try the case inconveniently far from home and office.¹³⁹ At the close of the case, Mr. Makemson requested a fee of \$9,500.¹⁴⁰ He was paid the statutory maximum—\$2,000.¹⁴¹

135. In *Commonwealth v. Johnson*, 187 A.2d 761 (Pa. 1963), counsel was assigned to defend an indigent defendant charged with murder. *Johnson*, 187 A.2d at 761. After the conviction, the trial judge awarded the attorney the \$500 per case maximum fee allowable under the state statute. *Id.* The conviction, however, did not dampen counsel's enthusiasm. He kept on litigating, filing post-conviction motions, and arguing the appeal. *Id.* at 761. Ultimately, on retrial, the judge found the defendant guilty of second-degree murder. *Id.* at 762. Understandably, counsel asked for another \$500 fee after the second trial, but the trial judge refused the request. *Id.*

136. *Smith v. State*, 394 A.2d 834, 838 (N.H. 1978) (noting that [W]hat constitutes reasonable compensation for performed services is, and has historically been, a matter for judicial determination. Moreover, it is peculiarly within the judicial province to ascertain reasonable compensation when the person who performs the services is acting under court appointment as an officer of the court. We view it implicit in the constitutional scheme that the courts of this State have the exclusive authority to determine the reasonableness of compensation for court-appointed counsel. The statute, in question intrude upon this judicial function in violation of the constitutional separation of powers mandate.

(internal citations omitted)

137. *Makemson v. Martin County*, 491 So. 2d 1109, 1111 (Fla. 1986).

138. *Id.*

139. *Id.*

140. *Id.* Experts actually testified that the value of his work was closer to \$25,000. *Id.*

141. The trial court was not able to coerce an attorney to handle the appeal even for \$2,000. The trial court had to put the appeal assignment out to bid and ultimately accepted the low bid of \$4,500, despite Florida statutes's limit of \$2,000. *Id.*

Makemson challenged the fee limits and the trial court held:

[T]his court is confronted with conflicting laws, one of which requires competent counsel for a defendant who has been sentenced to death and the other stating that defense counsel can be paid only \$2,000 for his services One of these laws must yield to the other. There is no doubt in the court's mind that the Legislature, if confronted with the problem, would admit that the law requiring competent counsel was paramount and superior to the law allowing a mere \$2,000 fee for the dreadful responsibility involved in trying to save a man from electrocution. Therefore this court finds that [the statute] in setting rigid maximum fees without regard to the circumstances in each case is arbitrary and capricious and violates the due process clause of the United States and Florida Constitutions. In simpler language, the Statute is impractical and won't work.¹⁴²

The Florida Supreme Court affirmed, finding the statute unconstitutionally limited the power of the judiciary to administer justice and protect the rights of the accused.¹⁴³ “[w]e must focus upon the criminal defendant whose rights are often forgotten in the heat of this bitter dispute. In order to safeguard that individual's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter.”¹⁴⁴

The Supreme Court of Oklahoma took an even broader approach.¹⁴⁵ In 1989, two attorneys appointed to represent Delbert Lynch on a capital murder charge succeeded in convincing the jury to sentence Mr. Lynch to life. Counsel requested fees well in excess of the statutory maximum of \$3,200.¹⁴⁶ The trial court approved the request, holding the fee cap unconstitutional.¹⁴⁷ On appeal the Oklahoma Supreme Court affirmed and went even further. Relying on the judiciary's “direct and inherent constitutional power to regulate the practice of law,”¹⁴⁸ the Court made a finding which substantially changed the assigned counsel system in Oklahoma.¹⁴⁹

In that state, attorneys in counties without public defender offices could be involuntarily conscripted into service.¹⁵⁰ In counties with public defenders, the need for assigned counsel was much less acute and attorneys were not

142. *Id.* (quoting *Martin County v. Makemson*, 464 So. 2d 1281, 1287 (Fla. Dist. Ct. App. 1985) (Anstead, C.J., dissenting)).

143. *Makemson*, 491 So. 2d at 1112.

144. *Id.* at 1113.

145. *State v. Lynch*, 796 P.2d 1150 (Okla. 1990).

146. *Id.* at 1153-54.

147. *Id.* at 1154.

148. *Id.* at 1162.

149. *Id.* at 1159-60.

150. *Id.* at 1159.

forced to accept assignments.¹⁵¹ The Oklahoma Court declared the disparity in the treatment of assigned counsel to be unconstitutional,¹⁵² encouraged the creation of voluntary pools of attorneys to end the practice of involuntary assignment,¹⁵³ ordered the establishment of a statewide pay scale, held that "[i]n order to place the counsel for the defense on an equal footing with counsel for the prosecution, provision must be made for compensation of defense counsel's reasonable overhead and out of pocket expenses,"¹⁵⁴ and, finally, reaffirmed the trial court's power to award extraordinary fees when appropriate.¹⁵⁵ Reacting to the ruling, the Oklahoma legislature created an Indigent Defense Board that organized a state-wide plan for the provision of indigent defense services and raised assigned counsel rates.¹⁵⁶

Thus, litigation begun narrowly as a challenge to a restrictive payment scheme generated far-reaching change. In condemning statutes that limited judicial discretion, courts in Oklahoma, Florida and New Hampshire¹⁵⁷ asserted their power to ensure criminal defendants' Sixth Amendment rights in the face of legislative inactivity.

3. *Fee Caps as Creating a Conflict of Interest*

Defense attorneys have argued that low fees and maximum awards engender a unresolvable conflict between counsel and client that necessarily adversely affects the quality of representation and requires reversal of a conviction. This argument builds upon precedent requiring reversal of a conviction where counsel was either completely denied at a critical stage in the criminal proceeding or was not removed from the case despite a clear conflict of interest.¹⁵⁸ In those situations, prejudice is presumed.

151. *Id.*

152. *Id.* at 1163.

153. *Id.* at 1159-60.

154. *Id.* at 1161.

155. *See id.* at 1161-62. *See also* *Bye v. Dist. Court County of Larimore*, 701 P.2d 56, 60 (Colo. 1985) (holding that the 'judicial branch of government possesses the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities').

156. OKLA. STAT. ANN. tit. 22, § 1355-1370 (West Supp. 2001).

157. *Smith v. State*, *supra* note 136.

158. *United States v. Cronin*, 466 U.S. 648, 659 (1984) (holding that a young and inexperienced attorney who was given only three weeks to prepare for a technically complex and lengthy mail fraud trial was not *per se* ineffective). The Court held that there are circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. *See, e.g., Powell v. Alabama*, 287 U.S. 45 (1932) (arguing that representation was ineffective where one attorney was appointed

This strategy has not been successful.¹⁵⁹ Although courts understand the tension between economic self-interest and zealous advocacy, they are not persuaded that such routine and pervasive conflict undermines the reliability of a verdict or even affects attorney performance. Without explicitly distinguishing between an economic conflict and other more obviously prejudicial conflicts (such as when one attorney represents multiple clients with intersecting and incompatible defenses), no court has held that an economic conflict compels reversal unless, just as in the typical post-conviction ineffective assistance of counsel claim, there has been actual injury to the defendant.¹⁶⁰

When counsel agreed to represent Christopher Bacon, an escapee from a local Vermont correctional facility, on a murder charge at the assigned rate of twenty-five dollars an hour, the attorney was unaware of the case's full complexity.¹⁶¹ During discovery, counsel realized that the prosecution intended to call an expert to testify to a DNA match between the murder victim's blood and blood stains found on the defendant's vest and jeans.¹⁶² Counsel asked for permission to withdraw from the case and moved for dismissal of the charges.¹⁶³ He claimed that the low fees coupled with the amount of preparation time required created an unresolvable conflict between his client and himself.¹⁶⁴ The request was denied.¹⁶⁵ Meanwhile, counsel was

to represent an entire group of innocent, falsely accused young men); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (reversing a conviction because the trial court failed to inquire into the conflict).

159. *See* *State v. Bacon*, 658 A.2d 54 (Vt. 1995).

160. *Id.*; *Webb v. Commonwealth of Virginia*, 528 S.E.2d 138 (Va. Ct. App. 2000).

161. *Bacon*, 658 A.2d at 66.

162. *Id.* at 67.

163. *Id.* at 66.

164. *See id.*

165. *Id.* at 67. As my colleague Professor Vanessa Merton has noted

The reported opinions on ineffective assistance are replete with examples of lawyers pleading with trial judges, fruitlessly, to be relieved from criminal defense appointments because the lawyers knew that they were or would be in stark violation of DR 6-101(A)(1). . . . *See, e.g., Aldrich v. Wainwright*, 777 F.2d 630, 633 (11th Cir. 1985) (holding that continuance will not be granted even though counsel stated that he was 'totally unprepared' and not in a position to provide competent legal representation; as a result, defendant convicted and sentenced to death); *Dillon v. Duckworth*, 751 F.2d 895, 897 (7th Cir. 1984) (upholding conviction and death sentence of defendant despite trial court's denial of defense lawyer's request for continuance of murder trial because of his inability to prepare due to three major life crises—his father's heart surgery, his brother's paralysis, and his own divorce—in the preceding three months; counsel had been ordered to proceed even though he had spent less than four hours with defendant); *United States v. Ruiz*, 533 F.2d 939, 939-40 (5th Cir. 1976) (refusing to grant continuance or withdrawal even though counsel had been arrested on an extradition warrant during trial, and had requested continuance after release because he was in 'emotional shamble' and could not proceed); *United States v. Ploeger*, 428 F.2d 1204,

unable to find a DNA expert willing to consult on the case for the fee that the assigned counsel administrator was willing to pay.¹⁶⁶ In the end, he failed to contest the admissibility of the DNA evidence, or to cross-examine the state's DNA experts, or to call any expert witnesses of his own. Instead, he sat quietly while the evidence was introduced.¹⁶⁷

One of the grounds for Bacon's appeal was ineffective assistance of counsel. He contended that the "State's failure to pay [his counsel] in a timely manner for expenses and services . . . created a conflict of interest by forcing counsel to choose between his family's financial welfare and his loyalty to his client, thereby denying defendant effective assistance of counsel."¹⁶⁸

Although the Vermont Supreme Court implicitly accepted the premise that low attorney fees could create a valid conflict, it nonetheless refused to reverse Bacon's conviction.¹⁶⁹

There was no evidence that trial counsel neglected this case or that he was forced, out of financial necessity, to spend less time on this case than he should have spent. He made no attempt to show specifically how the State's failure to pay him in a timely manner limited his preparation of his client's defense.

In short, the Court found that trial counsel and his witnesses had simply attacked, in a general way, the state system for compensating assigned

1205 (6th Cir. 1970) (upholding conviction and twenty-year sentence of defendant after one-day trial, although lawyer had been ordered to trial on his first day of appearance in the case, and had told the judge that he had never seen the indictment, investigated, nor prepared the case); *Wood v. Superior Court*, 690 P.2d 1225 (1984), *overruled in part on other grounds*, *DeLisio v. Alaska Superior Court*, 740 P.2d 437 (Alaska 1987); *see also Stern v. County Court*, 773 P.2d 1074, 1080 (Colo. 1989) (holding that an attorney appointed to represent a criminal defendant who believes that he or she is incompetent to handle the case bears the burden of proving that incompetence to the court); *State v. Wilson*, 687 P.2d 800, 802-03 (Or. Ct. App. 1984) (denying defense counsel's request to withdraw from the case, despite his contention that he could not adequately defend his client because he was intimidated by the trial judge); *In re J. R. C.*, 593 S.W.2d 124, 124-25 (Tex. App. 1979) (finding that lower court properly denied counsel's request to withdraw due to his lack of experience and familiarity with criminal trials); *cf. Easley v. State*, 334 So. 2d 630, 632 (Fla. Dist. Ct. App. 1976) (granting on reconsideration an initial denial of motion to withdraw in felony case, but holding lawyer in contempt and fining him \$500 for informing defendant that he felt incompetent to provide representation). *See generally* Annotation, *Ineffective Assistance of Counsel: Right of Attorney to Withdraw, as Appointed Defense Counsel, Due to Self-Avowed Incompetence*, 16 A.L.R.5th 118 (1993 & Supp. 2000).

Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" if You're Trying to Put That Lawyer's Client in Jail?*, 69 *FORDHAM L. REV.* 997, 1027-28 n.83 (2000).

166. *State v. Bacon*, 658 A.2d 54, 67 (Vt. 1995).

167. *Id.*

168. *Id.* at 66.

169. *Id.* at 67-69.

counsel, rather than establishing that the purported conflict had a concrete effect on this particular defendant. This was insufficient to meet defendant's burden.¹⁷⁰

The economic conflict cases raise a valid issue. It is virtually impossible for an underpaid assigned counsel or contract lawyer to work as diligently for an assigned client as that lawyer might like or as the facts might warrant. The poorly paid lawyer will inevitably tend to complete work on assigned criminal cases as quickly as possible. The more time an assigned case takes, the less time the lawyer has for a better paying client, or even for additional assigned matters.

The conflict is real. Even the most diligent lawyers struggle with it every day as they try to make a living and zealously advocate for their clients. However, if the issue is raised by an individual attorney during the pendency of a particular assignment, it will be resolved pre-trial either by the trial court substituting one lawyer for another—with uncertain benefit for the client, or by an award of extraordinary fees for the individual attorney—with no beneficial effect for other, similarly situated, attorneys or their clients. If the economic conflict is raised post-conviction as a challenge to the reliability of a particular conviction, it will be measured by the post-conviction *Strickland* ineffectiveness standard,¹⁷¹ requiring a showing of specific prejudice, and is thus unlikely to succeed.

B. Systemic Litigation—Sixth Amendment Right to Counsel

Overall, fee litigation has been only moderately successful in improving the delivery of defense services to the poor. The approach has inherent limitations. First, the cases focus primarily on the interests of lawyers to be compensated fairly—rather than on the rights of indigent defendants to

170. *Id.* at 68. *See also* State v. Taylor, 947 P.2d 681 (Utah 1997). There, Von Lester Taylor raised a similar economic argument to the Utah assigned counsel system in 1997, after his attorney gave a closing argument which contained no logical arguments and failed to ask the jury for mercy. *Id.* at 688. Although the Court found that “[o]verall, Levine did not give a virtuoso performance,” *id.*, that poor compensation attracts poor attorneys, and that poorly paid attorneys fail to spend the time needed to prepare a case, *id.* at n.2, the Court could find no support in the record for the purported conflict. *Id.* at 690. Levine had not requested additional funds at any time, nor had he asked for assistance, or to be relieved from the case. *See id.* at 688. Moreover, appellate counsel did not explain the casual relationship between low assigned counsel fees and Mr. Levine’s poor performance. *See id.* Accord Webb v. Commonwealth, 528 S.E.2d 138, 142-45 (Va. App. 2000) (holding that Virginia’s rate of pay, then lower than any other state’s, did not cause a conflict of interest for assigned counsel).

171. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See* discussion *supra* notes 50 and 110 and accompanying text.

effective assistance of counsel. Furthermore, fee litigation is simply too restrictive an approach to generate far-reaching change. Even if a challenge is successful in raising fees, a decision in a fee litigation case generally does not address the other problems that frequently exist in an assigned counsel plan: lack of supervision; lack of independence of counsel; and the absence of appointment standards, training, or support services. Although individual courts have leveraged requests for additional fees into opportunities to revamp entire indigent defense delivery systems,¹⁷² typically courts resolve the cases and controversies before them with narrow and specific rulings. If a lawyer requests additional fees or a higher rate of pay, courts will limit the relief granted to that request. Thus fee litigation addresses only a single facet of the complex arrangement for providing criminal defense services.

The more effective strategy is to mount a systemic Sixth Amendment challenge to a jurisdiction's mechanism for providing criminal defense services.¹⁷³ A systemic challenge can address a broad range of issues; it can focus on the rights of defendants, not their lawyers and can analyze the quality of representation provided to the entire class of individuals who receive criminal defense services, rather than just the services provided in one particular trial. Further, the approach can trigger broad remedies—injunctive or declaratory relief with the potential to prompt legislative response.¹⁷⁴

Systemic litigation is difficult, however. Success is not assured. Careful planning and preparation are essential. The following ingredients are necessary: egregious conditions (in other words—a real crisis), allegations of actual injury to clients, litigation support from a law reform organization or bar association, and public favor.

172. See, e.g., *State v. Lynch*, 796 P.2d 1150 (Okla. 1990) (changing the operation of the judgment defense system in Oklahoma based on the judiciary's constitutional right to regulate the law).

173. A number of commentators have made this same point. See Richard J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203, 216-17 (1986); Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808 (2000); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000). See generally Robert A. Schapiro, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231 (1989) (arguing that courts should be able to create "legislation" in the school desegregation context).

174. This is exactly what happened in Arizona and Louisiana. See Stookey & Hammond, *infra* note 184 (discussing *State v. Smith*, 705 P.2d 1376 (Ariz. Ct. App. 1985)); Calogero, *infra* note 196 (discussing *State v. Peart*, 621 So. 2d 780 (La. 1993)). See also *Doyle v. Allegheny County Salary Board*, No. GD-96-13606 (Pa. Ct. C. P. filed 1997); *Rivera v. Rowland*, No. CV 950545629S, 1996 WL 636475 (Conn. Super. Ct. Oct. 23, 1996) (where a settlement added fifty-four new permanent positions to the Connecticut public defender office over a two-year period along with a five million dollar budget increase over the same period). See *infra* Part III.B.

1. Egregious Conditions

When a county provides criminal defense services to clients by contracting out the work to the lowest bidder without regard for qualifications or track record, conditions are ripe for litigation. In Mohave, Arizona, law firms submitted sealed bids for the indigent criminal work.¹⁷⁵ The presiding judge opened the bids and summarized the information in a cover letter to the County Board of Supervisors.¹⁷⁶ The judge made no effort to distinguish among bidding law firms on the basis of experience, ability, or reliability although it would have been possible to do so.¹⁷⁷ Each year the Board simply accepted the bids of the lowest bidders—except for one year when it rejected the bid of an attorney who had been held in contempt for failing to file a brief.¹⁷⁸

The chosen firm would be paid what was bid no matter how many or what type of cases arose in the contract year; no matter how much time or expertise those cases required; and regardless of the staff attorneys' experience level.¹⁷⁹ There was no limit to the number of cases any one attorney might be assigned.¹⁸⁰ Contracting attorneys were required to pay for the services of investigators or experts needed in the preparation of the case. Moreover, they were permitted to have a private practice in addition to their contract work.¹⁸¹

Represented at trial by a Mohave contract attorney, Joe Smith alleged on appeal that his Sixth Amendment right to counsel had been violated by the contract defense system. Although the court refused to reverse Smith's conviction for ineffective assistance of counsel, finding that his individual representation had been adequate,¹⁸² the court's ruling—in effect a declaratory

175. *State v. Smith*, 681 P.2d 1374, 1379 (Ariz. 1984).

176. *Id.*

177. *Id.*

178. *Id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *Id.* at 1378, 1381. Nevertheless, the court did reverse Smith's conviction because Smith hadn't been permitted to call an alibi witness. He was convicted again after remand. *State v. Smith*, 705 P.2d 1376 (Ariz. Ct. App. 1985).

judgment creating a inference of inadequate representation¹⁸³—ended the use of low bid contracts in Mohave.¹⁸⁴

Rick Tessier, a public defender in New Orleans, labored under conditions similar to those experienced by the Arizona contract attorneys.¹⁸⁵ In 1991 Tessier was assigned to represent Leonard Peart on rape, robbery and murder charges, while he was simultaneously responsible for about seventy other felony matters in a New Orleans Parish court.¹⁸⁶ On every available date, Tessier was scheduled to begin the trial of a different client. Completely overwhelmed, Tessier asked for help. He petitioned for support services, explaining that he was handling far too many cases and unable to provide adequate assistance to any of his clients. The trial court responded positively, finding that Tessier's working conditions were so extreme as to prevent him from providing reasonably effective assistance of counsel.¹⁸⁷

The court found the entire public defense system in the city of New Orleans to be unconstitutional "because it does not provide adequate funding for indigent defense and because it places the burden of funding indigent defense on the city of New Orleans."¹⁸⁸ The judge's ruling required reductions in Tessier's caseload and suggested that the legislature set aside funding to acquire a library for the defender organization, hire an investigator, and ensure support services.¹⁸⁹ Further, to reduce the public defender docket, the judge promised to assign future indigent criminal cases to members of the local bar who were not on any assigned counsel list or plan and who may not have been accustomed to providing indigent criminal defense services.¹⁹⁰

Ultimately, on appeal, the Louisiana Supreme Court agreed with two of the trial court's most important findings, while rejecting many of its more specific directions.¹⁹¹ The Louisiana Supreme Court concurred that

183. *Smith*, 681 P.2d at 1383 (holding prospectively that representation by a contract attorney would raise an inference of inadequate representation of counsel). In fact the court said that the county system was the "least desirable and can result in inadequate representation by counsel." *Id.* at 1383.

184. See John A. Stookey & Larry A. Hammond, *Rethinking Arizona's System of Indigent Representation*, Ariz. Att'y, Oct. 1996, at 28, 30 (reporting that the maximum allowable caseloads set by the Supreme Court of Arizona in *Smith* were subsequently adhered to by all contract attorneys, and that a subsequent case in Yuma County, *Zarabia v. Bradshaw*, 912 P.2d 5 (Ariz. 1996), sparked the creation of a public defender system in the county).

185. See *State v. Peart*, 621 So. 2d 780 (La. 1993).

186. *Id.* at 784.

187. *Id.* at 784-85.

188. *Id.* at 784.

189. *Id.* at 784-85.

190. *Id.* at 785.

191. *Id.* at 786-92. The Supreme Court limited its ruling to Section E, a single city district, and, more

ineffective assistance of counsel could be determined pre-trial¹⁹² and acknowledged that excessive caseloads could result in constitutionally inadequate assistance of counsel.¹⁹³ “Many indigent defendants in Section E are provided with counsel who can perform only pro forma, especially at early stages of the proceedings. They are often subsequently provided with counsel who are so overburdened as to be effectively unqualified.”¹⁹⁴

The Louisiana Supreme Court’s ruling—that any defendant tried in Section E would be presumed to have been ineffectively represented so long as the legislature did not take steps to reduce the workload and improve conditions for the public defenders¹⁹⁵—prompted the legislature to increase the budget for the public defenders by five million dollars in the next legislative session.¹⁹⁶

2. *Allegations of Actual Injury*

Conditions do not have to sink to the obviously nightmarish levels of Mohave County, Arizona, or the Section E Parish in New Orleans, before a systemic Sixth Amendment challenge can be mounted against a particular arrangement for providing criminal defense services. However, in the absence of shockingly egregious conditions, a lawsuit must establish—at a minimum—that the services provided are causing actual injury to clients. Actual injury can be established through a combination of anecdotal and empirical evidence.¹⁹⁷ But without the facts to convincingly prove harm to the system’s clients—whether juveniles, adults in family court, or criminal defendants—courts will reject complaints as not justiciable.

The failure to precisely detail how high caseloads hurt clients undermined Sixth Amendment litigation in Minnesota. There, in 1992, the Chief Public Defender filed a lawsuit in the local district asking for declaratory relief and alleging that the Minnesota funding system for public defense violated the

importantly, refused to implement any of the expert recommendations that the trial court had adopted. *Id.* at 788-92.

192. *Id.* at 787.

193. *Id.* at 790.

194. *Id.* at 789.

195. *Id.* at 791.

196. Chief Justice Pascal F. Calogero, Jr., *The State of Indigent Defense in Louisiana*, 42 LA. B. J. 454, 457-58 (1995) (reporting that as a result of the decision, a statewide task force was established by executive order. Task force recommendations resulted in the creation of a statewide defender board).

197. See discussion *infra* Part III.B.2.c (demonstrating actual injury through various kinds of evidence).

Sixth Amendment rights of the public defender's clients.¹⁹⁸ At that time, the public defense system in Minnesota was supervised by the State Board of Public Defense. As part of its monitoring function, the Board adopted caseload standards for the public defenders. Chief Public Defender Kennedy argued that constant under-funding forced his staff to handle caseloads far in excess of the standards adopted by the Board, "and that this overburdening . . . impaired the rights of his indigent clients and threatened to cause systemic professional misconduct."¹⁹⁹

Kennedy set out the claim in accurate but general terms, reporting that since his staff of defenders could not refuse new clients, they were forced to enter quick pleas on behalf of some clients in order to be available for others and were unable to spend sufficient time with any of them.²⁰⁰ No individual clients signed affidavits testifying to the adverse effects of public defender representation on them.²⁰¹ No lawyers accepted responsibility for errors resulting from too much work and too little support.²⁰² On appeal from initial success, the Court of Appeals held that Kennedy's "claims of constitutional violations [were] too speculative and hypothetical to support jurisdiction in this court,"²⁰³ pointing out that,

[t]he district court did not find that Kennedy's staff had provided ineffective assistance to any particular client, nor did it find that Kennedy faced professional liability as a result of his office's substandard services. Nor do any of Kennedy's clients join him in attacking the statutory funding scheme at issue here by presenting evidence of inadequate assistance in particular cases.²⁰⁴

Because the public defender was unable or unwilling to expose specific errors or omissions, the court found the claim of across-the-board ineffectiveness illusory and speculative.²⁰⁵ The fact that the caseloads of the public defenders violated accepted standards was not persuasive, standing alone. The allegation that the general working conditions would eventually cause injury to clients was insufficient. The court would not act without proof that the violation actually caused injury to clients.²⁰⁶

198. *Kennedy v. Carlson*, 544 N.W.2d 1, 3 (Minn. 1996).

199. *Id.* at 4.

200. *Id.* at 6.

201. *Id.* at 8.

202. *See id.*

203. *Id.* at 8.

204. *Id.*

205. *Id.*

206. *Id.*

a. Litigation Support

The lesson to be learned from the failure of the Minnesota litigation is that a public defender understandably will resist revealing how its own staff is causing or has caused injury to clients. The office would have to publicly admit error—a task that is unpleasant, bad for staff morale, and potentially damaging to its credibility with the public. The Minnesota litigation might have been more successful if it had been brought by a different plaintiff. If a bar association or a civil rights organization, perhaps on behalf of named plaintiffs, brought the suit it could have detailed frankly the injuries to the public defender's clients.

In fact, this strategy has been successfully used by the American Civil Liberties Union ("ACLU") to improve the quality of representation provided to indigent defendants in several jurisdictions. In Connecticut, for example, the ACLU and its local affiliate, the Connecticut Civil Liberties Union ("CCLU"), on behalf of named plaintiffs (clients of the Connecticut public defender), challenged the state indigent defense system (naming the public defender as a defendant); they asserted that public defender caseloads had increased over the years while the number of defenders had remained static and that resources for the defenders had failed to keep pace with the increased number of cases.²⁰⁷ As an outside observer, the ACLU was in a better position to objectively assess the public defenders' practice, exploring exactly how that practice, compromised by excessive workload, minimized the opportunities for clients to defend themselves.

The second amended class action complaint in the Connecticut lawsuit describes the enormous caseloads shouldered by the public defenders—three times higher than the recommendations of the National Advisory Commission of Criminal Justice Standards and Goals. The complaint further details the lack of social work services, the absence of library support or computers for research and word processing, the dearth of trials or other fact-finding proceedings; and, most importantly, the complaint charges that those inadequacies were causing harm to current clients.²⁰⁸

207. *Rivera v. Rowland*, No. CV 950545629S, 1996 WL 636475, at *1 (Conn. Super. Ct. Oct. 23, 1996).

208. *Id.* The complaint further referenced the annual public defender testimony in the state legislature requesting additional funds and a well-respected study of the Connecticut government which criticized the operation and funding of the defender office, and compared it unfavorably to other state defender programs. The defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction was denied by Superior Court.

The lawsuit was withdrawn after the governor and the public defender agreed to a settlement and successfully lobbied the legislature for additional funding for the office.²⁰⁹ That funding permitted a substantial number of new hires and raised the fees for private attorneys accepting those indigent cases that the public defender is unable to handle. The terms of the settlement require the public defender to oversee the conflict counsel, draft practice standards, and install and operate a case management system.²¹⁰

The ACLU brought a similar challenge to the quality of services provided by public defenders in Allegheny County, Pennsylvania.²¹¹ In addition, litigation supported by the ACLU and the Arnold & Porter law firm is pending in Mississippi.²¹² In New York City, the New York County Lawyers' Association ("NYCLA") is challenging low assigned counsel fees.²¹³ NYCLA is able to present a more honest picture of the quality of representation than could individual Assigned Counsel Plan attorneys.

b. Standing

Law reform organizations suing on their own behalf—rather than in the name of individual clients/plaintiffs—may draw a challenge to the organization's standing. NYCLA's current litigation, challenging the low assigned counsel fees paid to those attorneys who accept family and criminal

Judge Lavine.

209. *Rivera v. Rowland*, No. CV 95545629S, 1996 WL 636475, at *7 (Conn. Super. Ct. Oct. 23, 1996).

210. *Rivera v. Rowland*, No. CV 950545629S, 1996 WL 636475 (Conn. Super. Ct. Oct. 23, 1996); *Joint Motion for Approval of Withdrawal of Action* (dated July 2, 1999). See generally Recorder's Court Bar Ass'n v. Wayne County Court, 503 N.W.2d 885 (Mich. 1993) (involving a consortium of bar associations challenged judge-made local rules for the assignment of counsel that would have established set fees for every case regardless of whether the case was disposed of by plea or by trial). The Supreme Court of Michigan appointed a special master to hold hearings and gather information on defense services. *Id.* at 887. Noting that the system had the dubiously "meritorious effect of speeding up the docket," the master found that a fixed fee system encourages assigned counsel to persuade their clients to plead guilty. *Id.* at 887-88. "[I]f a lawyer is not paid to spend more time with and for the client, [there is an incentive] to put in as little time as possible for the pay allowed Essential motions are neglected." *Id.* at 888. The services of expert witnesses were never available to the indigent clients unless their assigned counsel lawyers supplemented the public funds out of their own pockets. *Id.* at 887 n.5. On the basis of those findings, the Supreme Court of Michigan held that the fixed-fee system failed to provide "reasonable compensation," and that "whatever the system or method [devised], the compensation *actually* paid must be reasonably related to the representational services that the individual attorneys *actually* perform." *Id.* at 895.

211. *Doyle v. Allegheny County Salary Board*, No. GD-96-13606 (Pa. Ct. C.P. filed 1997).

212. *Quitman County v. Mississippi* (CIV. Action No. 99-0126).

213. *N.Y. County Lawyers Ass'n v. Pataki*, N.Y. L.J., Jan. 22, 2001, at 25 [hereinafter NYCLA].

court assignments in Manhattan and the Bronx, alleges that the state's minimal assigned counsel fees and monetary cap provisions²¹⁴ caused an exodus of lawyers from the plan and resulted in those lawyers who continue to accept assigned counsel matters to handle many more than they can effectively represent. Because New York City depends upon assigned counsel lawyers to represent a large percentage of the people arrested each day,²¹⁵ NYCLA claims that

the State's failure to take measures to ensure adequate levels of compensation has placed the system of assigned counsel on the brink of collapse, creating an imminent threat of widespread due process and right to counsel violations, and allowed the First Department's assigned counsel program to deteriorate to a point where it subjects children and indigent adults to a severe and unacceptable risk where meaningful and effective legal representation is no longer provided.²¹⁶

New York State challenged NYCLA's standing to assert the claims.²¹⁷ In response, NYCLA pointed to its historic relationship to indigent criminal defense. NYCLA was one of the original signors and co-sponsors of New York City's plan for provision of criminal defense services to the indigent, contemplated by Article 18-b of the New York County Law.²¹⁸ Members of NYCLA sit on the Screening Committee which approves attorneys to handle assigned matters, handles complaints against those lawyers, and re-certifies them for continued service.²¹⁹ Before resorting to litigation, NYCLA struggled for years to improve the quality of criminal defense services provided to the poor in the First Department of New York City through

214. N.Y. County L. Art. 18-B § 722-c (set in 1986 at \$25 and \$40 for in and out-of-court work).

215. The Assigned Counsel Report does not ascribe an exact percentage to the number of cases handled by 18-B panel lawyers. The ACP Administrator's Report for 1998 reports that 18-B lawyers in the First Department represented a total of 177,965 defendants on homicide, felony and misdemeanors in the Bronx and Manhattan that year (on file with the Appellate Division, First Department). The Executive Summary of the Criminal Court of the City of New York reports that the total number of filings in 1998 in those two boroughs was 213,206 (on file with Chief Administrator of the Criminal Court). It is unclear which of these number is the most reliable. It is clear, however, that New York City relies heavily on the 18-B panel and that the low fees paid for 18-B work have dissuaded new lawyers from joining the panel and current panel members from taking new assignments.

216. NYCLA, *supra* note 213, at 25 (see Complaint filed 2/18/00, on file with the author).

217. *Id.* at 26. (See State's Motion to Dismiss on file with the author.) New York State moved to dismiss the claim on the grounds, among others, that the bar association did not have standing to sue, that the complaint failed to state a justiciable case or controversy against the governor, that the relief sought interfered with executive and legislative discretion not subject to judicial review, and would require an order directing the expenditure of state funds. NYCLA, *supra* note 213, at 26.

218. NYCLA, *supra* note 213.

219. See N.Y. RULES OF COURT § 612 Appendix A (McKinney 2001).

screening, re-certification, and training. Justice Lucindo Suarez, of the New York Supreme Court, Appellate Term, denied the motion to dismiss.²²⁰ "[T]his court cannot ignore [the obvious fact] that if NYCLA is denied standing, it would exempt from judicial review the failure of the State to comply with its statutory and constitutional obligations."²²¹

c. Documenting Actual Injury: Voices of the Under-Represented

Successful litigation depends upon bringing to the court the voices of the accused who are not being adequately represented. In its Allegheny County complaint, for example, the ACLU alerted the Court of Common Pleas to the serious deficiencies in public defense services caused by cuts to the public defender's budget.²²² As background, the complaint described the lack of training for attorneys, the absence of investigators, social workers, clerical personnel, expert witnesses; the inadequate library facilities; the lack of written policies regarding ethical obligations to clients; and the total absence of any case management system.²²³ It explained how many cases the public defender was required to handle each year and compared that number to the nationally accepted caseload recommendations.²²⁴ It contrasted the county expenditures on funding for the Allegheny public defender office with the much greater amount spent on the Allegheny prosecutor and compared the \$2.9 million spent on public defense in Allegheny county unfavorably to expenditures of up to \$13 million in other similarly sized counties in other parts of the country.²²⁵

As a result of these and other inadequacies, the lawsuit claimed that public defender attorneys were unable to provide representation at arraignment; to counsel their clients between court appearances; to find and use transcripts of pre-trial hearings at trial; to investigate cases; to obtain expert assistance; or to file motions.²²⁶ The complaint specifically documented how long some of the plaintiffs had been in jail without having their case investigated; how long others waited to confer with appointed

220. NYCLA, *supra* note 213, at 25.

221. *Id.*

222. Plaintiff's Third Amended Class Action Complaint at 1-12, *Doyle v. Allegheny County Salary Bd.*, No. GD-96-13606 (Pa. Ct. C.P. filed Dec. 1, 1997).

223. *Id.* at 22.

224. *Id.* at 20.

225. *Id.* at 25-26.

226. *Id.* at 26-30.

counsel; and how long still others, with documented histories of mental illness, waited for psychiatric evaluation.²²⁷ It included examples of cases where expert assistance should have been requested, but were not; of defendants shuttled between multiple lawyers none of whom knew what the others were doing; and of drug-addicted clients, who should have been considered for treatment or pre-trial diversion but were not.²²⁸

NYCLA used a similar technique in its pending lawsuit. NYCLA combined anecdotal and statistical information which it brought to the court's attention in the initial complaint as well as in the brief and appendices submitted in response to the State's motion to dismiss.²²⁹ In addition to studies and reports documenting the numbers of cases handled by the assigned counsel lawyers, the rapid disposition rate, and lack of trials or other fact-finding procedures, NYCLA also presented affidavits from assigned counsel attorneys who believed that they were at risk of rendering ineffective assistance of counsel because of their working conditions.²³⁰

The New York Supreme Court rejected New York State's argument that NYCLA's claim was not justiciable.²³¹ "The fact that this case may have political overtones, involve public policy, or possibly touch upon executive or legislative functions does not negate its justiciability."²³² The court was motivated by the stories of the adults and children whose lives were adversely affected by the challenged representation and by the indisputable evidence of inadequate representation presented through hard numbers.

3. *Public Support*

In addition to showing actual injury and egregious conditions, systemic litigation has a greater chance of success with media and public support. The NYLCA suit was filed after a flurry of newspaper articles documented the

227. *Id.* at 2-11.

228. *Id.*

229. See NYCLA, *supra* note 213, at 26 (the brief and appendices include: the Annual Report of the Chief Administrator of the Courts (documenting the number of cases being processed in the family and criminal courts), a Report from the Center for Battered Women's Legal Services, Sanctuary for Families (discussing the effects of low fees on the ability of battered women to obtain adequate representation); New York Law Journal Articles (documenting the effects of lack of assigned counsel attorneys on clients), practice manuals (discussing standards of practice); empirical studies of family court; and reports from the assigned counsel administrator (materials on file with author).

230. See *id.*

231. *Id.* at 25-26 (rejecting the state's arguments for dismissal).

232. *Id.* at 25.

unfortunate consequences of the legislature's failure to raise assigned counsel rates,²³³ and the publication of a report on the crisis in the Assigned Counsel system drafted by the two of the state's most influential administrative judges.²³⁴ Litigation in Connecticut was heralded by a number of favorable editorials and feature stories, and bolstered by a respected study of effectiveness in the state government that criticized the state indigent criminal defense system.²³⁵ In Louisiana, just before Tessier initiated his dramatic action, a noted expert studied the conditions in the Parrish courts, bringing the inadequacies to the public's attention.²³⁶ A number of these lawsuits have benefitted from pro bono assistance provided by major law firms. NYCLA's suit is being handled by Davis Polk & Wardwell in New York. Arnold & Porter is conducting litigation in Mississippi.

4. Choice of Forum

Federal courts have been prevented largely from engaging in the reform of state indigent defense systems by abstention doctrine. In *Younger v. Harris*, the Supreme Court held that federal courts should not interfere with the operation of local criminal prosecutions.²³⁷ Since then, federal courts have

233. See, e.g., John Caher, *Chief Judge Announced Reforms: Judiciary to Move Ahead on Reorganizing Courts, Drug Laws 18-B Rates*, N.Y. L.J., Jan. 9, 2001, at 1 (discussing the judiciary's reform proposals, especially regarding compensation for counsel assigned to represent indigent defendants); Daniel Wise, *Assigned Counsel Wins Case and Higher Rates*, N.Y. L.J., Jan. 18, 2001 at 1, col. 4 (explaining that several judges had authorized pay for assigned counsel at rates greater than that set by statute in the face of legislative inertia); Robin Topping, *Attorneys Protest Low Pay for Indigent Cases*, NEWSDAY, Jan. 17, 2001, at A31, available at 2001 WL 2912240 (interviewing Long Island assigned counsel lawyers who organized protests against the low rates of pay which they claim affects the quality of their practice).

234. ASSIGNED COUNSEL REPORT, *supra* note 47.

235. See, e.g., Editorial, *Public Defenders are Overloaded*, HARTFORD COURANT, Jan. 10, 1995, at A10, 1995 WL 53 18983; Lynne Tuohy, *Constitutional Challenge Foreshadowed by Official Reports, Court Rulings*, HARTFORD COURANT, Jan. 6, 1995, at A14 (1995 WL 5315405); and CCLU Suits Lays Bare a Public Defender System in Crisis, HARTFORD COURANT, Jan. 8, 1995, at A1, 1995 WL 5315612; Andrew Blum, *Defense of Indigents: Crisis Spurs Lawsuits. Public Defender Say a Funding Squeeze Has All But Nullified the Right of the Poor to Counsel*, NAT'L L.J., May 15, 1995, at A1, col. 2.

236. See Calogero, *supra* note 196.

237. *Younger v. Harris*, 401 U.S. 37 (1971). See also *O'Shea v. Littleton*, 414 U.S. 488 (1974) (holding that criminal defendants who sued in federal court to stop illegal bond setting, sentencing, and jury fee practices in criminal cases are barred from litigating in federal court by *Younger v. Harris* abstention doctrine); *Gardner v. Luckey*, 500 F.2d 712 (5th Cir. 1974) (denying relief for a claim that the Florida public defender systematically failed to meet minimum constitutional standards in the representation afforded indigents because the claimants' injury was too speculative, and because federal abstention doctrine prevents it further refused to intervention in state judicial processes); *Noe v. County of Lake*, 468 F. Supp. 50 (N.D. Ind. 1978) (refusing to intervene in a claim alleging ineffective assistance of counsel and

generally refused to entertain constitutional challenges to the operation of any part of a state criminal justice system because, to do so, would necessarily affect criminal prosecutions.²³⁸ So, for example, when indigent defendants in Galveston, Texas, sued local officials in state court complaining that assigned counsel were ineffective; that bail was too often excessive; that grand jury proceedings were faulty; and that pleas were coerced, the Fifth Circuit Court of Appeals dismissed the suit because it believed that granting the necessary equitable relief would require excessive federal interference in the operation of state criminal court.²³⁹

Similarly, the Second Circuit quickly reversed a highly acclaimed decision of the Eastern District Court of New York which intervened to improve the quality of criminal defense services.²⁴⁰ Amid the success of the prison reform cases in the early 1970's, a class of indigent defendants complained that their Legal Aid Society lawyers were too overburdened to provide adequate representation.²⁴¹ After lengthy hearings, the District Court agreed and ordered the Society to refrain from accepting additional cases until caseloads dropped to a manageable level.²⁴² The Second Circuit reversed in a *per curiam* decision holding that the Legal Aid Society was not acting under color of state law and that federal district courts have "no power to intervene in the internal procedures of the state courts."²⁴³ Thus, although it could be argued logically that ensuring constitutionally adequate defense services does not necessarily require judicial interference with any criminal conviction or restrain any prosecution,²⁴⁴ federal courts have not been persuaded and have, for the most part, removed themselves from the evaluation and reformation of state criminal justice systems.²⁴⁵

conflict of interest).

238. *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. 1981).

239. *Id.*

240. *Wallace v. Kern*, 392 F. Supp. 834 (E.D.N.Y. 1973), *rev'd*, 481 F.2d 621 (2d Cir. 1973).

241. *Id.* at 835.

242. *Id.* at 849.

243. *Wallace*, 481 F.2d at 621.

244. *See Lemos, supra* note 173 (making that argument in her very helpful student note).

245. Federal courts will consider lengthy delays in perfecting a criminal appeal as a violation of due process. However, even when inordinate delays have been proved, the federal courts are reluctant to order systemic improvements as a remedy. Some courts have threatened release of appellants in the face of excessive delay. *See, e.g., Harris v. Kuhlman*, 601 F. Supp. 987 (E.D.N.Y. 1985) (holding that the failure of court-appointed counsel to perfect petitioner's appeal may violate due process and equal protection and that the state is responsible for those violations). At least one court has used allegations of wide-spread systemic appellate delay as an opportunity to take a look at the operations of the public defender. *See Harris v. Champion*, 938 F.2d 1062 (10th Cir. 1991) (holding that excessive delay in obtaining an appeal may constitute a due process violation and remanding for a hearing to determine whether the appellate

The only federal ruling with any precedential value in this area is the initial Eleventh Circuit decision in *Luckey v. Harris*.²⁴⁶ *Luckey* was a civil rights action brought on behalf of all current and future criminal defendants and their counsel in Georgia. Plaintiffs alleged that "systemic deficiencies" in the Georgia defense system routinely deprived criminal defendants of their Sixth Amendment rights.²⁴⁷ The Court of Appeals found that "[t]he sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment."²⁴⁸ Conceding that the *Strickland* standard is inappropriate for a civil suit seeking prospective relief,²⁴⁹ the Court explicitly determined that claims of systemic ineffectiveness may be raised pre-trial so long as plaintiffs can establish "likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law."²⁵⁰ Although the *Luckey* complaint was eventually dismissed on abstention grounds, the Eleventh Circuit decision firmly established that defense services can be challenged prospectively.

Appellants have alleged that systemic delays in the appointment of counsel deny them their sixth amendment right to the representation of counsel at critical stages in the criminal process, hamper the ability of their counsel to defend them, and effectively deny them their eighth and fourteenth amendment right to bail, that their attorneys are denied investigative and expert resources necessary to defend them effectively, that their attorneys are pressured by courts to hurry their case to trial or to enter a guilty plea, and that they are denied equal protection of the laws. Without passing on the merits of these allegations, we conclude that they are sufficient to state a claim upon which relief could be granted.²⁵¹

delays are systematic to the Oklahoma Public Defender's office). Most have held that the appropriate remedy for such violations is a civil rights action for damages. *See, e.g.,* *Simmons v. Reynolds*, 898 F.2d 865, 869 (2d Cir. 1990) (denying release because the plaintiff eventually received an appeal); *Williams v. James*, 770 F. Supp. 103, 107 (W.D.N.Y. 1991) (holding that incarceration was not unlawful where prisoner's appeal eventually was heard).

246. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988). The Eleventh Circuit affirmed the District Court's dismissal. 976 F.2d 673 (11th Cir. 1992).

247. *Luckey*, 860 F.2d at 1013.

248. *Id.* at 1017.

249. *Id.*

250. *Id.* (citing to *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

251. *Id.* at 1018.

IV. STANDARDS: THE INFORMATION NECESSARY FOR REFORM

The successful settlements in Pennsylvania and Connecticut, NYCLA's preliminary victory in New York Supreme Court, and the favorable rulings in *Lynch*, *Smith*, and *Peart*, demonstrate that state courts will act to improve criminal defense services—if convinced that the working conditions of the defense bar are truly adversely affecting client representation. Finding horror stories or empirical evidence has not been the major obstacle for plaintiffs confronting systemic litigation. The major impediment has been the absence of an objective measuring tool to evaluate competence of counsel.

Lacking standards that establish the number of cases a defender can reasonably be expected to handle, for example, courts cannot assess complaints of excessive caseloads and will rely on their own subjective sense of what is appropriate. A judge whose work before taking the bench was in a city prosecutor's office where assistants routinely handle a hundred cases each day might have thought Rick Tessier's workload was tolerable, or even average.²⁵² A different judge with work experience in a law firm representing a well-to-do business clientele might have reacted differently. Judges cannot be expected to make such complex decisions with no more guidance than their individual sense of what is reasonable or manageable. Objective baselines establish what the profession believes is necessary and how far the system under scrutiny departs from accepted practice.

Just as standards for the management of correctional institutions provided the guidance necessary for judicial prison reform in the 1960's, the development of standards for the administration of defense services furnish the information necessary for systemic reform of indigent defense services today. Fortunately, the defense community has been recently and energetically engaged in the process of drafting, adopting, and implementing standards intended to guide not simply the performance of individual attorneys, but also the operation of defense organizations and systems.²⁵³

Three categories of standards are applicable to the defense function: eligibility standards, performance standards, and standards for the administration of delivery systems. Eligibility standards are used to evaluate whether an attorney has the requisite experience or credentials to take on a certain category of cases. In some death penalty states, for example, attorneys

252. See *State v. Lynch*, 796 P.2d 1150 (Okla. 1990).

253. See INST. FOR LAW AND JUSTICE, *supra* note 58 (collecting standards from across the country and publishing them electronically).

must enroll in specially tailored training classes and certify that they have tried a number of homicide cases before being approved for a death penalty case.²⁵⁴

Performance standards are “intended to be used as a guide to professional conduct.”²⁵⁵ The most complete set are the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*,²⁵⁶ detailing case handling guidance for the individual attorney. To be useful for a wide range of defenders, private and public, the standards are couched in general terms; for example, one standard states that “[d]efense counsel should act with reasonable diligence and promptness in representing a client.”²⁵⁷ “Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation. . . .”²⁵⁸ Another widely used set of performance standards are the National Legal Aid and Defender Association (“NLADA”) Performance Guidelines for Criminal Defense Representation, which identify the various stages of a criminal case, from the initial interview through investigation, motion practice, trial preparation, and sentencing, and suggest how attorney should handle each stage—a model code of conduct for criminal defense work.²⁵⁹

However useful these performance standards may be for training purposes, or to inspire defense attorneys, they sometimes set unrealistic goals for handling routine minor criminal cases and can be too vague to be helpful in a serious investigation into the adequacy of defense services.²⁶⁰ For example, ABA standards suggest an attorney should “conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of

254. See, e.g., IND. R. CRIM. P. 24; OHIO SUP. R. 20 (Anderson 2001); KAN. ADMIN. REGS.; NEBRASKA COMMISSION OF PUBLIC ADVOCACY, STANDARDS FOR INDIGENT DEFENSE SERVICES ON CAPITAL AND NON-CAPITAL CASES, STANDARD III. For a complete list, see INST. FOR LAW AND JUSTICE, *supra* note 58.

255. ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION STANDARD 4-1.1 (3d ed. 1993) [hereinafter DEFENSE FUNCTION STANDARD].

256. See *id.*

257. *Id.* 4-1.3(a).

258. *Id.* 4-1.3(e).

259. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995) [hereinafter NLADA].

260. In fact, the drafters of performance standards have generally been careful to state that the standards are not to be used as criteria by courts in evaluating the performance of particular attorneys or in determining the validity of any specific conviction. See DEFENSE FUNCTION STANDARD, *supra* note 255, at 4-1.1 cmt. (“[I]t is beyond the scope of these Standards to attempt to determine the conditions under which deviation from the recommendations made here warrants reversal or vacation of a conviction.”).

conviction.”²⁶¹ To be sure, on a serious felony matter or even a contested minor crime, attorneys must investigate, and failure to investigate could be considered incompetence, malpractice, or ineffectiveness.

Despite these admonitions, it is incontestible that investigations are rarely conducted into the tens of thousands of minor arrests processed in the criminal courts of our large cities.²⁶² Moreover, in most of those cases—arrests for possession of marijuana, trespassing, prostitution, driving without a license, or shoplifting²⁶³—defendants admit the charges and wish to resolve the situation as soon as possible, essentially eliminating the need for an investigation. Regardless of the realities of defense work, the routine lack of investigation into the vast majority of criminal charges would seem to violate ABA standards. In this and many other instances, practice is in constant conflict with performance standards.²⁶⁴

Again, despite NLADA standards which provide, at the initial appearance on the charges, attorneys should “enter[] a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so,”²⁶⁵ thousands of cases are disposed of at the initial appearance.²⁶⁶ Because

261. *Id.* at 4-4.1.

262. McConville & Mirsky, *supra* note 82, at 760-65. The authors found that Assigned Counsel Panel attorneys conducted investigations in only 27.2 percent of all homicide cases, in 12.2 percent of all other felony cases, and in only 7.8 percent of misdemeanor cases. *Id.* at 762. In addition to their failure to personally conduct investigations, Assigned Counsel Panel attorneys did not ask the courts to authorize the use of investigators to assist them. *Id.* at 763. 10.9 percent of the Assigned Counsel Attorneys never used an investigator on any case, 67.4 percent used them occasionally, and only 21.7 percent used investigators regularly. *Id.* at tbl. 6-3.

263. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order—Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 292-301 (1998) (describing the kinds of arrests—trespass, disorderly conduct, drinking a beer in public—which have become routine, the inordinate numbers of such arrests that are being made in New York City, and the disparate impact on minorities of the police policy of arresting people accused of misdemeanors).

264. Scott Glover & Matt Lait, *The Rampart Scandal; Parks Says Agencies Share Rampart Blame; Scandal: Prosecutors, Others, Missed ‘Red Flags,’ Chief Contends. Public Defender Rejects Call for Self-Critique*, L.A. TIMES, Mar. 2, 2000, at A1. If defense attorneys are aware of the existence of the rules, the discontinuity has two possible effects. It can either cause the defense practitioners to feel that they are continually breaking the rules, or it can cause them to discount the significance of the rules. In either event, constantly breaking rules breeds apathy to rules and an inability to differentiate the occasions when the rule should be followed from those occasions when it can be ignored. The Ramparts Scandal in Los Angeles is a perfect example of the ultimate consequence of this syndrome. Hundreds of innocent individuals, framed by corrupt police, entered guilty pleas, on the advice of public defenders who did not believe their clients’ protestations of innocence and who conducted no investigation into the facts of the charges. *Id.*

265. NLADA, *supra* note 60, at Guideline 3.1.

266. CRIMINAL COURT OF THE CITY OF NEW YORK, EXECUTIVE SUMMARY (statistics for Jan. 2000, showing that of the total of 367,962 criminal filings in 1999, 197,022 were disposed of in arraignments)

performance standards, such as those drafted by the ABA and the NLADA, do not differentiate between the case where a plea should not be entered immediately and the one where a plea is appropriate, they provide little guidance either for lawyers who need to prioritize their work or for judges called upon to evaluate the adequacy of a defense services system that provides representation to thousands of people. In fact, the standards seem almost irrelevant to the inquiry.

The third type of standard serves to guide the operation of defender plans or organizations. These “administration” standards address the functioning of systems rather than the performance of individual lawyers, focusing on management issues such as; whether the organization monitors the performance of its staff through supervision or other kinds of case management and control (including case and workload limits); whether it provides training or continuing legal education; and whether it supports staff by supplying ancillary investigative, social work and expert services, or adequate facilities. In short, administration standards look at whether the defense organization furnishes the ingredients essential to the functioning of a law firm providing criminal defense services.²⁶⁷ Administration standards are easier to draft accurately than standards which purport to identify when and for which clients lawyering services ought to be employed. Everyone in the defense community can agree that a defense organization ought to provide investigators for its lawyers, that it should ensure sufficient word processing capability so that motions can be typed, or that it should limit the number of cases its staff accepts—even though it is obviously impossible to identify, in the abstract, when an investigation should be conducted or when the defendant should exercise his right to testify, to give just two examples of the difficulty with performance standards.²⁶⁸ While performance standards must be vague enough to apply to a multitude of situations, administration standards can be specific. Thus, administration standards are a better tool for the evaluation of systems than performance standards are for measuring the effectiveness of an individual attorney on an individual case.²⁶⁹

(on file with the Chief Administrative Judge).

267. Naturally, there is some overlap between the performance, qualification and administration standards. Administration standards generally include requirements that relate to attorney qualifications as well as some provisions (such as when an attorney should begin representation and the duration of that representation) which could be easily categorized within performance standards.

268. See *Strickland v. Washington*, 466 U.S. 668, 688-89 (“No particular set for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.”).

269. Further, while the appropriate remedy for an individual attorney’s failure to comply with

Administration standards have been tested as a tool for monitoring the effectiveness of defense systems. In New York City, the intermediate appellate court for the First Judicial Department (presiding over appeals from the Bronx and Manhattan) adopted rules establishing an Indigent Defense Organization Oversight Committee ("IDOOC") with the responsibility to evaluate and monitor the provision of defense services by organized providers in those boroughs.²⁷⁰ To carry out its task, IDOOC borrowed from the ABA accreditation process which measures law schools against a set of standards generated by the legal education community. First, with input and advice from the organizations subject to monitoring, IDOOC drafted detailed administration standards.²⁷¹ Then, each organization was asked to complete a self-study detailing its compliance with the standards. Finally, with the assistance of volunteer lawyers from local bar associations, IDOOC conducted site visits to confirm the information in the self-study.

Analysis revealed most of the providers evaluated between 1996 and 1999 were in compliance with the IDOOC Guidelines, although the process did reveal inadequacies and strengths in the defense providers.²⁷² IDOOC reports its findings annually to the First Department. Although the Court could take

performance standards might be the reversal of the client's conviction, the appropriate remedy for an organization's failure to comply with administration standards is systemic change.

270. N.Y. RULES OF COURT § 613 (McKinney's 2001). In reaction to the decision of the Mayor of the City of New York to contract out portions of the indigent defense work in New York City to new and untested law firms, the Supreme Court, Appellate Division, First Department enacted Court Rules which authorized the creation of an oversight committee to monitor and evaluate the provision of services by all contract providers in the First Department (the Bronx and New York County). *Id.*

271. *General Requirements for All Organizations Providing Defense Services to Indigent Defendants* (1996) (promulgated pursuant to N.Y. RULES OF COURT at § 613.5, and available from the New York Supreme Court, Appellate Division, First Department), available at http://www.NYSOA.org/Defense_Services/defense_services.html. Since detailed standards are easier to use in monitoring than vague ones which could be open to multiple interpretations, IDOOC added specifics to its standards for the administration of defense services. The training standard, for example, includes sections discussing continuing legal education, trial advocacy training, as well as new attorney training. *Id.* The standards further require: a 1:10 supervisor to attorney ratio, periodic performance evaluations of staff by the supervisors, advertisement of opportunities for promotion, sufficient support services, and implementation of case management and quality control systems. *Id.* The most important IDOOC standard is the limit on attorney caseloads—since no attorney can provide quality services to too many clients. To provide added incentive to meet the standards, IDOOC decided that failure to meet any one of the standards would create a rebuttable presumption that the organization as a whole was not providing quality services. *Id.* The burden would be on the organization to explain how it was providing quality representation despite the failure. *Id.*

272. IDOOC has generated four reports: for the years 1996, 1997, 1998 and 1999. The reports generated media attention and perhaps influenced providers to make changes. Nothing in the Court Rules gives IDOOC any power to enforce its findings. See N.Y. RULES OF COURT (McKinney 2001).

action to prevent assignment of cases to out-of-compliance organizations, thus far it has not.

The New York Appellate Division's experience proves standards can be used by a monitoring body to evaluate the performance of a defender office. So long as the standards are drafted, or ratified in some way, by the relevant community subject to review, and if the monitoring body is seen to be non-political, fair, and knowledgeable, the results of the evaluation will be credible. Just as the development of correctional standards rendered the abstract notion of cruel and unusual punishment justiciable, so do administration standards translate the idea of effective assistance of counsel into a concrete form that can be used by a court.

V. A COORDINATING IDEA: THE PHILOSOPHY GUIDING REFORM

Three of the four elements which Feeley and Rubin characterize as prerequisites for judicial policy making are easily identifiable in the adequacy of counsel context.²⁷³ Crisis in the criminal justice system—in particular the recognition that innocent people are being convicted, that the death penalty is irrationally and unfairly imposed, and that many cases are rudimentarily handled—provide motivation. Courts can rely on a growing body of case law construing the Sixth Amendment to support intervention and guide decision-making. Moreover, standards designed to guide the administration of defense services provide a measure against which to consider challenged operations.

273. See FEELEY & RUBIN, *supra* note 5, at 211-33. In a book review published in July, 1999, Professor Marc Miller disputes Feeley and Rubin's conclusion that judges frequently engage in policy making. Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* (1998)). To support his argument, Miller points to what he characterizes as the failure of courts to plunge into detailed, prolonged, and exacting reformation of indigent criminal defense systems. Recognizing that the indigent criminal defense systems are appropriate for judicial intervention, he suggests that were Feeley and Rubin's premise true, more courts would have already followed the lead of *Peart, Smith and Lynch*. *Id.* at 1801-03. Instead, he asserts that, even subsequent to those decisions, courts presented with opportunities to improve criminal defense systems have ducked the challenge. *Id.* Thus, he concludes that state courts are more cautious policy makers than Feeley and Rubin would like us to believe. *Id.* at 1803-16. In this last conclusion he is undoubtedly correct. State courts did not blaze into reformation of criminal defense systems once courts in Louisiana and Oklahoma began to show the way. The decisions did not snowball as rapidly as decisions reforming prisons in the wake of *Talley*. However, Miller exaggerates the lack of judicial activity in this area, and, as a result, his predictions are overly pessimistic. Miller points to *Kennedy v. Carlson* to illustrate judicial reluctance, but ignores the success of the Connecticut or Allegheny County litigation, and, of course, his article was published before the NYCLA suit was filed.

It is a bit more difficult, however, to detect a “coordinating idea” or theme to guide the application of standards to the system under scrutiny.

Judge Henley was able to see corporeal punishment as a violation of the Eighth Amendment because he saw imprisonment differently than other judges. He conceived incarceration as having a purpose—rehabilitation. Of course, Judge Henley was not alone in his new vision. Prison officials themselves were re-conceptualizing their work. “[T]he rehabilitative ideal served as a major method of integration between their own role expectations and their personal attitudes. In many prison systems [rehabilitation was becoming] the ‘party line,’ the rationale that prison officials themselves would offer as the basis for their actions.”²⁷⁴ Guards became correction officers, professionals who trained for their work, who were evaluated, disciplined, and promoted.

Like the prison administrators of the past, today the indigent defense bar is undergoing its own re-assessment.²⁷⁵ When I graduated from law school in 1976, young attorneys gravitated to defense work for two reasons. First, they saw criminal defense, with its emphasis on rights jurisprudence, as a way to continue battling for civil rights²⁷⁶—an opportunity to assist the

274. FEELEY & RUBIN, *supra* note 5, at 260. As evidence for this proposition, Feeley and Rubin cite the American Correctional Association’s 1959 version of the Manual of Correctional Standards, as well as a 1979 Correctional Association survey, in which “prison administrators in Illinois consistently favored rehabilitation by overwhelming margins” *Id.* at n.*.

275. Cait Clarke, *Problem-Solving Defenders*, *supra* note 56, at n.82 (commenting that “[n]ationwide defender leaders and managers are now discussing ways to expand the role of defender inside their offices, in the justice system, and in their communities. For example the Bureau of Justice Assistance is funding a multi-year Executive Session on Indigent Defense Systems at Harvard’s Kennedy School of Government with the goal of improving the effectiveness of the defense function in state systems. . . . Likewise, the Vera Institute of Justice operates a National Defender Leadership Project (NDLP) that provides training to assist defender managers to realize fully their potential leadership roles in the system.”). “For the importance of providing a voice to criminal defendants, see John B. Mitchell, *Narrative and Client-Centered Representation: What is a True Believer to Do When His Two Favorite Theories Collide*, 6 CLINICAL L. REV. 85, 98-101 (1999) (criminal defense lawyer arguing the importance of ‘culling much fuller stories from my clients and actively involving them in lawyering strategy and decision making’). Professor Mitchell now ‘cringes’ as he recalls his early lawyering days, when he saw his clients as little more than an impediment to winning ‘his’ case.” See also Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEG. ETHICS 199 (1999) (arguing that Chief Public defenders need to “break out of . . . their roles forcing them to operate solely within budget guidelines”).

276. See Stuntz, *supra* note 92, at 5. “The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendant much worse than white ones. Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.” *Id.*

underprivileged and work for a more just society.²⁷⁷ Second, young attorneys were attracted to defense work because it gave them an opportunity to try cases—to challenge authority in an acceptable form.²⁷⁸ Both motivations focus on outcomes—winning was everything.

Since then, criminal procedure has changed. Today rights jurisprudence is less important to the eventual outcome of a case than is the reasonableness of police conduct.²⁷⁹ As a result, young defenders are less able to win pre-trial motions based on constitutional violations. Advocates must look at other approaches to winning cases and helping clients. Possibly defenders will devote increased attention to building true defenses to criminal charges—defenses such as alibi, justification, mistake, lack of intent—that focus on questions of innocence and guilt and degrees of each rather than on the behavior of the police. Building these defenses requires more out-of-court time and preparation than simply cross-examining police behavior at a hearing. At a pre-trial hearing on a motion to suppress evidence for violation of constitutional rights, counsel can use the police reports prepared by the testifying officers that will be turned over as discovery by the prosecutor just before the hearing starts.²⁸⁰ To prepare a defense of alibi, on the other hand, defense counsel must locate, interview, and prepare the witness—on his or her own. Defense counsel cannot rely on the police or the prosecutor to assist or to have any information about the existence of this potential witness. To refute the prosecutor's charge that the defendant intended to kill his victim, to choose another example, counsel will have to locate, hire, prepare and pay an expert. In order to conduct a competent evaluation, the expert must have information about the accused's life prior to arrest. That information, in turn, must be tracked down and subpoenaed. In order to accomplish these goals, defenders need sufficient investigative staff, motivation, and the time to

277. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1275 (1993) (reflecting on his reasons for becoming a public defender).

I saw myself as a kind of 'hero' of the oppressed, the one who fights against all odds, a sort of Robin Hood figure who can conquer what others cannot and who does not have to conform to the moral rules society reserves for others. One element of the 'hero' mentality, of course, is the thrill of winning.

Id.

278. *Id.*

279. See generally COLE, *supra* note 1, at 16-62 (illustrating how the federal courts have cut back on the protection provided by the fourth amendment to give the police greater latitude to search individuals—particularly poor, young, minority individuals).

280. N.Y. CRIM. PROC. LAW § 240.43 (McKinney 1993).

prepare their cases.²⁸¹ If defenders start to litigate more expensive factual claims rather than, or in addition to, the fairly easy and cheap legal claims which have been rendered largely ineffectual by the conservative trends in the law, the amount of case-preparation required for the defense will expand.

If the trends in capital litigation can be seen as a bellwether for the direction that criminal law is taking generally, current doctrine is hinting that courts are already ascribing more value to a thorough and complete factual investigation. In capital cases, where the issue of ineffectiveness of counsel has been raised on appeal or by collateral motion, convictions are more often reversed for failure to present mitigation evidence or on account of the complete absence of an investigation than for failure to raise constitutional rights. In fact, the failure to investigate and feature evidence which might have convinced a jury to vote for life was the single most common example of attorney ineffectiveness in the Columbia University long term study of error rates in capital cases.²⁸²

Moreover, in addition to the reduced the power of rights jurisprudence, the nature of criminal adjudication has evolved. Most cases are pled. Trials

281. Stuntz, *supra* note 92, at 40 (compellingly explaining how assigned and appointed defenders prefer to bring legal claims such as suppression motions or speedy trial dismissal motions). He argues this is because

[f]actual arguments are not merely harder to prepare and pursue than legal claims; they are harder to evaluate. And quick evaluation is key. In a system in which ninety-plus percent of convictions are by guilty plea and in which public defenders represent hundreds of felony defendants per year, defense lawyers' most important job is triage: deciding which (few) cases to contest somewhat, which (very few) cases to contest seriously, and which ones not to contest at all. . . . In such a world, factual arguments—claims that the defendant did not do the crime, or acted in self-defense, or lacked the requisite mens rea—tend to require nontrivial investigation simply to establish whether there is any argument to make. Most possible challenges to the legality of a police search, meanwhile, appear on the face of the police report

The relevant choice, therefore, is not whether to file a suppression motion or make a self-defense argument, but whether to file the motion or find out if the argument even exists, in a world where it probably doesn't. Given how cheap is the process that decides the suppression motion, and given the expense of *both* determining whether the self-defense argument is worth making *and* actually taking that argument to trial, the system places substantial pressure on counsel to opt for the procedural claim rather than the (potential) substantive one.

Id.

282. Liebman, Fagan & West, *supra* note 3. This finding is startling because very few ineffectiveness claims succeed on appeal. According to David Cole,

[o]f 103 reported cases raising such claims in the California Supreme Court from January 1, 1989, through April 21, 1996, 94 were denied, 3 were remanded for further factual development, and only 6 were granted. Of 158 reported cases raising such claims in the United States Court of Appeals for the Fifth Circuit during the same period, 142 were denied, 10, remanded, and 6 granted.

COLE, *supra* note 1, at 80. Cole admits that these numbers are probably conservative, since many denials are unpublished and no reversals are.

resolve only a small number of cases.²⁸³ Because trial skills, or the lack thereof, affect only a small number of cases, pre-trial work should be emphasized, because finding out what really happened, who the witnesses are, and what they could have seen is the only key to a favorable disposition.²⁸⁴

Furthermore, current criminal justice policy has swept more and different kinds of people into the criminal justice system.²⁸⁵ More children are being arrested and charged as adults. More non-citizens are arrested. More mentally ill individuals are caught up in the criminal justice system. Criminal defense attorneys must represent them all and respond to their very different needs. To handle those diverse challenges, attorneys must be skilled interviewers and counselors. They must notice when a client is not responding to questions. They must recognize when a client has been arrested only because he is homeless and living on the streets.

Finally, specialized courts requiring specialized case-resolution skills are rapidly gaining favor across the country.²⁸⁶ Drug courts have proliferated wildly from their inception in Dade County, Florida.²⁸⁷ In these targeted rehabilitation courts, the accused gives up the right to contest the charges and

283. CRIMINAL COURT OF THE CITY OF NEW YORK, EXECUTIVE SUMMARY (Jan. 2, 1994) (statistics of 1993 criminal court filings separated into various categories showing that in 1993 there were only 943 felony trials and 231 misdemeanor trials in the entire city of New York, although in that year there were a total of 276,401 criminal charges brought); STATE OF NEW YORK REPORT OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS FOR 1998 (1999) (on file with the Chief Administrative Judge).

284. Important or not, fact investigation has not been integrated into the typical law school curriculum, despite the fact that fact investigation has been recognized as a crucial lawyering skill by the ABA Clinical Skills Section which identifies the many ways in which the legal profession serves the public and describes the skills and values necessary for practice. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Robert MacCrate ed., 1993). It categorizes the crucial lawyering skills and values as: Problem Solving; Legal Analysis and Reasoning; Fact Investigation; Communication; Counseling; Negotiation; Litigation and Alternative Dispute Resolution; Organization and Management of Legal Work and Recognizing and Resolving Ethical Standards. *Id.* at 129-98. In fact, it could be argued that a pervasive emphasis on trial advocacy skills has actually trained young lawyers against conduct fact investigation by handing them a prepared trial package that contains every document they need. Only in clinical courses where students actually handle cases is fact investigation taught and rewarded.

285. Order maintenance policing, which has been loudly praised for reducing violent crime in New York City, relies for its effectiveness on arresting the "disorderly." Harcourt, *supra* note 263, at 343 ("The disorderly are, after all, the usual suspects under a regime of order-maintenance policing. The squeegee man, the panhandler, the homeless person, the turnstile jumper, the unattached adult, the public drunk—these are apparently the true culprits of serious crime.").

286. See, e.g., Susan K. Knipps & Greg Berman, *New York's Problem-Solving Courts Provide Meaningful Alternative to Traditional Remedies*, N.Y. ST. B.A. J., June 2000, at 8 (discussing the use of such specialized courts in New York).

287. See LEE, *supra* note 57.

agrees to enter long-term treatment.²⁸⁸ Referrals are suggested by a counselor who evaluates the accused and determines the appropriate medical approach. Treatment is monitored by the court.²⁸⁹ The role of the defender in these treatment courts is substantially less adversarial—and perhaps less clear—than in most courts where adjudication is premised on a traditional adversarial contest.²⁹⁰

These intertwining forces have shifted the heart of defense work from trial advocacy—which concentrates on legal analysis, rhetoric, and the advocates' presentation skills—to pre-trial preparation, sentencing advocacy, diversion and mitigation. Today, as a result of these changes in the criminal justice system, organizations providing public defense services are training their lawyers in diversionary work, investigation, and client-centered counseling, as their staff handle fewer serious crimes and more "quality of life offenses,"²⁹¹ fewer adults and more children. For the first time, legal services offices are searching for ways to evaluate the different services they are providing to clients as they re-assess their role. Some are even conducting client satisfaction surveys.²⁹² Further, exonerations of the innocent and reversals of improperly imposed death sentences should force even the most well-respected and highly skilled public defense organizations to re-think their approach to cases.

Courts may more easily see the rushed and cursory services provided by an overburdened defender as violating the Sixth Amendment if those courts understand the increasingly more complex role of the defender. Then the

288. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1246-54 (1998).

289. *Id.*

290. *Id.*

291. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 476 (2000) (finding that New York City law enforcement, as a result of reliance on "Order-Maintenance Policing" (OMP), an offshoot of the popular Broken Windows theory of policing which links disorder to violence, has vastly increased the numbers of misdemeanor arrests made each year, but that, at the same time, there has been a "sharp decline in [the] quality and sustainability in court" of those arrests). Misdemeanor arrests have increased from 129,404 in 1993 to 215,158 in 1998. *Id.* (citing Division of Criminal Justice Services, State of New York, Criminal Justice Indicators: New York City, 1995-1999, at <http://www.criminaljustice.state.ny.us/crimnet/cjsa/areastat/areastat.html>). At the same time "the rate at which prosecutors declined to pursue those cases rose" as well. *Id.* "In 1998, prosecutors dismissed 18,000 of the 345,000 misdemeanor and felony arrests, approximately twice the number dismissed in 1993." *Id.* (citing Ford Fessenden & David Rohde, *Dismissed Before Reaching Court: Flawed Arrests Rise in New York*, N.Y. TIMES, Aug. 23, 1999, at A1).

292. See Clarke, *supra* note 275 (The Bronx Defenders, a young small defense organization in one of the boroughs of New York City, has begun to use client satisfaction surveys to learn how its lawyers could be doing a better job in arraignments.).

adjudicatory process should carry increased significance. Outcomes will not be the only measure of effectiveness. The evolution of the role of defense attorney from gladiator to client-centered counselor may be the coordinating idea that, when combined with motivation, information, and precedent, inspires the courts to make policy.

VI. CONCLUSION

Some commentators believe the judiciary will never improve the quality of criminal defense services, whether by applying *Strickland* or any other standard, because money is the essential ingredient for the "elimination of factors conducive to widespread no-fault ineffectiveness,"²⁹³ and the courts do not control appropriations. Those critics say courts can do little to improve attorney performance through the application of constitutional principles. I disagree. As Professor Dripps so powerfully put it, everyone agrees that *Gideon* was correctly decided.²⁹⁴ There is near unanimity that public defense systems must be improved.²⁹⁵ Finally, all who have seriously considered the question agree that *Strickland* has not worked either to prevent miscarriages of justice or to improve attorney performance. If the legislature refuses to support the defense function, the criminal justice community and the courts must devise a solution. I believe they can.

293. Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 115 (1986).

294. Dripps, *supra* note 53, at page 307-08.

295. I have only come across a single study concluding that public defense is doing a "good" job. The study was completed by the National Center for State Courts. It is entitled *Indigent Defenders Get the Job Done and Done Well*, and was submitted to the State Justice Institute in 1992. The report finds that public defenders do a comparable job to that performed by private retained counsel. The authors chose odd criteria to measure effectiveness—speed for example. The report found that public defenders process cases more quickly than do private practitioners. The authors believed rapid case processing to be a measure of success. Most other observers would probably disagree.